



**Kenya County Government Workers Union v County Government
of Kitui & another (Constitutional Petition E003 of 2024)
[2025] KEELRC 3735 (KLR) (17 December 2025) (Judgment)**

Neutral citation: [2025] KEELRC 3735 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS

CONSTITUTIONAL PETITION E003 OF 2024

JW KELL, J

DECEMBER 17, 2025

**IN THE MATTER OF ARTICLES 10, 22, 23, 27,28, 41, 47
AND 232 OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF THE VIOLATION OF ARTICLE 10
(2) (B) AND (C) OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF SECTIONS 3 & 4 OF THE
FAIR ADMINISTRATIVE ACTIONS ACT 2015**

IN THE MATTER OF SECTION 138 OF THE COUNTY GOVERNMENTS ACT 2012

IN THE MATTER OF SECTIONS 10(5), 13 & 26 OF THE EMPLOYMENT ACT 2007

IN THE MATTER OF SECTION 138A OF THE COUNTY GOVERNMENTS ACT 2012

AND

**IN THE MATTER OF THE DOWNWARD VARIATION AND/OR REDUCTION
OF THE SALARIES OF THE EARLY CHILDHOOD DEVELOPMENT
EDUCATION (ECDE) TEACHERS BY THE COUNTY GOVERNMENT OF KITUI**

IN THE MATTER OF THE CONSTITUTIONAL PETITION

BETWEEN

KENYA COUNTY GOVERNMENT WORKERS UNION PETITIONER

AND

COUNTY GOVERNMENT OF KITUI 1ST RESPONDENT

KITUI COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT



JUDGMENT

DIVISION - Introduction

1. The Petitioner, a registered trade union to represent County Government workers within the Republic of Kenya, commenced this suit on behalf of its members, vide a Petition dated 3rd September 2024 seeking for the following orders:-
 - a. A declaration that the terms of offer of appointment contained in the Petitioner's members' letters of appointment and terms of engagement before 30th June 2023 are the proper and conclusive terms of the employment contract regulating the employment relationship between the affected Petitioner's members and the Respondents.
 - b. A declaration that the Respondents' decision and/or directive to unilaterally, arbitrarily and unlawfully vary and/or reduce the Petitioner's members' salaries is unlawful, unfair, and violates the affected Petitioner's members' fundamental rights and freedoms under Articles 27,28,41 and 47 of *the Constitution* and Sections 10,13 and 26 of the *Employment Act*.
 - c. A declaration that the Respondents have violated Sections 10 (5), 13(1) and 26 of the *Employment Act* 2007, the Regulation of Wages (General) (Amendment) Order 2022, and Section 138 (a) of the *County Governments Act* by unilaterally and arbitrarily altering the terms and conditions of service or employment of the Petitioner's members who are ECDE teachers in Kitui County to their disadvantage.
 - d. A declaration that the 2nd Respondent's reduction in the salaries of the Petitioner's members amounts to an unlawful and unfair constructive dismissal of the said members of the Petitioner from employment.
 - e. A conservatory order restraining the Respondents, either by themselves, employees, servants and/or agents from varying the terms of engagement of the Petitioners' members terms of service as confirmed in the employment of the Respondents and/or carrying to their disadvantage and detriment the terms of service of the Petitioner's members as obtaining in their letters of appointment.
 - f. A conservatory order permanently restraining the Respondents either by themselves, their agents, servants and/or employees, from varying and/or altering the Petitioner's members' terms of service/employment and/or engagement, to the detriment of the Petitioner's members and without complying with the due process of the law.
 - g. A mandatory order compelling the Respondents to compensate the affected members of the Petitioner by paying the said Petitioner's members affected by the impugned unlawful variation/reduction of salaries in full the unlawfully varied/reduced salaries from 1st July 2023 to date.
 - h. A declaration that the 2nd Respondent's directive and/or decision to unilaterally vary/alter the salaries of the Petitioner's members constitutes a breach of the affected members' contracts of employment with the Respondent.
 - i. A declaration that the 2nd Respondent's decision to stop the salaries of some of the members of the Petitioner, remove them from its roll, and to unprocedurally dismiss them from employment is unlawful and unfair.



- j. An order of damages to the Petitioner’s members for breach of their contracts of employment by the Respondents and for unlawful and unfair dismissal from employment.
 - k. Costs and interest on orders (g) and (j) above at Court rates till payment in full.
 - l. The costs of this Petition be borne by the Respondents.
 - m. The Honourable Court be pleased to issue any other further orders and grant any other relief that it may deem fit, just, appropriate, and fair to grant in the circumstances.
2. The Petition was filed alongside the Supporting Affidavit of one ROBA SHARY DUBA sworn on 3rd September 2024.
 3. In response to the said Petition, the Respondents filed a Replying Affidavit sworn on 3rd July 2025.

The Petitioner’s case in summary

4. The Petitioner is a trade union drawing membership from employees of the 47 counties with the mandate of ensuring favourable working conditions for its said members. The Petitioner’s case is that its members were employed by the 2nd Respondent to the 1st Respondent County on 1st February 2023 vide Letters of Appointment of even date, to the positions of ECDE Teacher as follows:
 - a. 81 of its members were employed as ECDE Teacher III (Job Group CPSB 11), at a gross salary of Kshs. 32,760/- each. These members are:
 - i. Lenah Kavinya Peter
 - ii. Merceline Mutui
 - iii. Penina M. Mwangangi
 - iv. Caroline Rhoda Kalungu
 - v. Grace Kavili Musili
 - vi. Zipporah K. Musyoka
 - vii. Esther Mutheu Muli
 - viii. Eunice Yumbua Maleve
 - ix. Florence Vaati Douglas
 - x. Christine Museveki Muli
 - xi. Grace Mwendu Nzuki
 - xii. Kamene Mwalili
 - xiii. Nicholas Muli Kisau
 - xiv. Jascar Esther Muli
 - xv. Brenda Monicah Munga
 - xvi. Mwendu Ndongye
 - xvii. Salome Rael Ndana
 - xviii. Beatrice M.Mwangi



- xix. Purity Taabu Mati
- xx. Petronilah W. Mwanja
- xxi. Winfred K. Kinu
- xxii. Annet N. Mutua
- xxiii. Patricia Mbilu Syomane
- xxiv. Felistus M. Mutua
- xxv. Charity M. Mbengei
- xxvi. Muunda Kasele
- xxvii. Felicitas M. Ngundu
- xxviii. Nasca Mwendu Muthui
- xxix. Evalyne Mwikali Kingoku
- xxx. Rebecca M. Musyoki
- xxxi. Grace Mutuo Musyoka
- xxxii. Grace Ngena Mwathi
- xxxiii. Muema Mutinda
- xxxiv. Abigail Kanini Mwanja
- xxxv. Judy Patrick
- xxxvi. Rosine M. Mulwa
- xxxvii. Jane M. Ngala
- xxxviii. Angela M. Musyoka
- xxxix. Janet K. Kakundu
- xl. Agnetta Munguti
- xli. Stephen M. Muyanga
- xlii. Yvonne M. Mwanza
- xliii. Angela Kambua Nguu
- xliv. Fransisca Kaluki Kivou
- xlv. Judith Kathini Mutongi
- xlvi. Charles W. Nzuki
- xlvii. Elizabeth Kitivui
- xlviii. Elijah D. Musembi
- xlix. Felistus K. Kasia



- i. Rose K. Mwangangi
- ii. Anna M. Kituli
- iii. Koki Kilunngya
- iiii. Regina N. Musau
- lv. Patricia K. John
- lv. Faith Ndungi Nyavoa
- lvi. Onesmus Munyao Mulu
- lvii. Kandenge M. Mutie
- lviii. Maryeter K. Ngenesi
- lix. Stella N. David
- lx. Mukai Kitunda
- lxi. Jennifer Nzula Maweu
- lxii. Janet K. Nyongoto
- lxiii. Mwende Mathenge
- lxiv. Judy N. Mutiso
- lxv. Makau Mukaku
- lxvi. Mary Nzioki
- lxvii. Kanundu Katee
- lxviii. Amos M. Kimanzi
- lxix. Monicah W. Muli
- lxx. Nascar Kamene Kisingu
- lxxi. Christine K. Munyoki
- lxxii. Meshack K. Kilungya
- lxxiii. Caroline M. Ikuthu
- lxxiv. Agnes K. Wilfred
- lxxv. Felistus Syombua Kilonzi
- lxxvi. Stephen M. Nzengee
- lxxvii. Rachaeal K. Ngui
- lxxviii. Festus Kivoto Kisovi
- lxxix. Geoffrey K. Isika
- lxxx. Eliza Kimwele

The 81 members of the Petitioner accepted the offers of employment and began working for the 1st Respondent with the legitimate expectation that as they progressed in their careers, their salaries would be varied upwards. On 30th June 2023, 4 months after their appointment, the said 81 employees of the 1st Respondent were issued with new appointment letters dated 30th



June 2023 by the 2nd Respondent appointing them to the positions of ECDE Teacher III (Job Group CPSB 13) with effect from 1st July 2023 at a revised salary of Kshs. 22,590/-, more than Kshs. 10,000/- less than their original salary of Kshs. 32,670/-. The Petitioner is categorical that the variation of the 81 employees' salaries was effected without consultation. The 81 members signed the new appointment letters as they were afraid that if they did not, they would lose their jobs.

b. 3 of its members who are degree holders were employed as ECDE Teacher III (Job Group CPSB 09) at a gross salary of Kshs. 50,770/- each. These members are:-

- i. Nicholas Mutie Mbutu.
- ii. Ruth Monica Mui.
- iii. Irene Ndinda William.

The 3 members duly accepted the offer. On 15th June 2023, 3 and a half months after their appointment, the said 3 employees of the 1st Respondent were issued with new appointment letters dated 15th June 2023 by the 2nd Respondent appointing them to the positions of ECDE Teacher III (Job Group CPSB 11) with effect from 1st July 2023 at a revised salary of Kshs. 32,670/-, more than Kshs. 18,000/- less than their original salary of Kshs. 50,770/-. Despite the variation of the 3 employees' salaries having been effected without consultation, the 3 members signed the new appointment letters as they were threatened by the Chairperson of the 2nd Respondent that if they did not, they would lose their jobs.

c. 1 member of the Petitioner, Munyao Benjamin Nzumo, who is a certificate holder was employed as ECDE Teacher III (Job Group CPSB 11) at a gross salary of Kshs. 32,670/-. The member duly accepted the offer.

On 30th June 2023, 4 months after his appointment, the said employee of the 1st Respondent was issued with a new appointment letter dated 30th June 2023 by the 2nd Respondent appointing him to the position of Assistant ECDE Teacher III (Job Group CPSB 14) with effect from 1st July 2023 at a revised salary of Kshs. 21,370/-, more than Kshs. 10,000/- less than his original salary of Kshs. 32,670/-. Despite the variation having been effected without consultation, the member signed the new appointment letter as he was threatened by the Chairperson of the 2nd Respondent that if he did not, he would lose his job.

d. A fourth category of 9 members of the Petitioner were employed as ECDE teachers since 2013, but the 2nd Respondent dismissed them without communication in 2023 from their permanent and pensionable employment and stopped paying their salaries. These members are:

- i. Felesi Mavindi.
- ii. Agela Mwikali Mbula.
- iii. Hellen Kilonzo.
- iv. Agneta Mueni Mathitu.
- v. Jackline Mulee Mutua.
- vi. Francisca Kawembe Kathangu.
- vii. Malonza Ng' Ondu.



- viii. Lilian Mutheki Musya.
 - ix. Fredinah Esther Tabitha.
 - x. Mwikali Mulei.
5. The Petitioner avers that the offers of employment to its members in the above set out first three categories (a), (b) and (c) were made pursuant to the Scheme of Service for ECDE Teachers, 2021 developed by the 2nd Respondent in conjunction with the Council of Governors and the Salaries and Remuneration Commission, among other relevant stakeholders. The appointment letters dated 1st February 2023 provided that the petitioner's members would be under an initial probationary period of six (6) months, after which their employment would be confirmed subject to satisfactory performance. Contrary to the said Scheme of Service, the initial appointment letters and the law, the 2nd Respondent varied the terms of service of the said employees, by unilaterally reducing/adjusting their salaries downward and extending their probationary periods for a further six (6) months from 1st July 2023, without consultation.
 6. It is the Petitioner's case that there is evidence that the Respondents consulted their affected employees prior to varying their terms of employment, by sending them individual letters informing them of the reduction in their salaries, hence their actions were arbitrary unilateral, and amounted to constructive dismissal of the affected employees.
 7. According to the Petitioner, for a variation of contract to be lawful, there ought to be mutual agreement between the employer and the employee or their union representatives, and it is not sufficient for the employer to merely ambush the employee with a new contract of employment with varied/new terms of remuneration and require the employee to sign it in a take-it-or-leave-it basis as is the present case. Remuneration as a term of employment is fundamental as it affects the employee's livelihood, so for a salary reduction to be valid, the intended reduction must be communicated to the employee through a letter and acceptance must be obtained. The Petitioner states that this due process was not followed. As such, the reduction of the salaries of the members of the Petitioner is unlawful and amounts to repudiation of their contracts of employment.
 8. The Petitioner argues that the Respondents' conduct contravened Section 138 (1) of the [County Governments Act](#) which provides that an officer's terms of service shall not be altered to the officer's disadvantage; Article 41 of [the Constitution](#) on fair labour practices including fair remuneration and reasonable working conditions; Article 47 of [the Constitution](#) on fair administrative practices including the right to be heard; Article 232 of [the Constitution](#); Sections 3, 4 (2) and (3) of the Fair Administrative Actions Act, 2015; and Sections 10 and 26 of the [Employment Act](#) 2007. They state that the actions of the Respondents have exposed the Petitioner's members to extreme hardship, and violated their Constitutional rights as aforesaid.

Respondent's case in brief

9. The Respondents admit that the Petitioner's members who are the subject of this petition were their employees having been issued with letters of appointment dated 1st February 2023. They state that in 2023 or thereabouts the 1st Respondent pursuant to the powers delegated under the [Early Childhood Education Act](#) Cap 211B Laws of Kenya and pursuant to a Scheme of Service formulated by the Council of County Governors in 2021, resolved to transition the Early Childhood Development and Education (ECDE) teachers from casual employees to permanent and pensionable terms of employment.



10. The aforementioned Scheme provided for well-defined job descriptions and specifications with a clear delineation of duties and responsibilities at all levels within the structure for the Early Childhood Development and Education teachers. Article 1.8 of the ECDE Scheme of Service provided that Counties were at liberty to adopt the said Scheme, but another proviso was that this adoption was subject to the availability of financial resources by the Counties.
11. On 1st February 2023 or thereabouts the 2nd Respondent, following the implementation of recommendations of the aforesaid Scheme, issued letters of offer employment on a permanent and pensionable basis for 81 ECDE teachers as follows:
 - a. Job group CPSB 011 Graduate teacher III were offered a gross salary of Kshs.32,670/-
 - b. Job group CPSB 13 were offered a gross salary of Kshs.22,590/-
 - c. Job Group CPSB 09 were offered a gross salary of Kshs.50,000/-
12. It was a term of the said offer that the remuneration package may be subject to revision by the Salaries and Remuneration Commission. The offer letter in part read as follows;

“The Remuneration package may be revised as advised by the salaries and Remuneration Commission (SRC) from time to time”.
13. Upon the 2nd Respondent conducting various consultative meetings with various stakeholders among them the Salaries and Remuneration Commission, the 2nd Respondent rescinded the aforementioned offers and issued afresh offers of employment in line with the SRC communication dated the 5th day of April 2023. On 30th of June 2023 the 2nd Respondent in compliance with the Salaries and Remuneration Commission's recommendations to amend and prescribe the recommended wages payable for the correct job group cadres and classification, issued letters of offer capturing the correct job group cadres for the ECDE teachers and the accompanying remuneration applicable thereto, as follows:
 - a) Job group CPSB 11 Graduate teacher III were offered a gross salary of Kshs.32,670/-
 - b) Job group CPSB 14 were offered a gross salary of Kshs.21,370/-
 - c) Job group CPSB 13 were offered gross salary of Kshs.22,590/-
14. The Respondents rely on Section 38 (2) of the [Early Childhood Education Act](#) which provides that the county Government shall pay to early childhood education teachers employed in public education centers within the county such remuneration as it shall in consultation with the Salaries and Remuneration Commission determine. They defend the recommendations by the Salaries and Remuneration Commission as having been informed by: non-availability of funds; benchmarking with neighboring counties; workload factors; and comparison with remuneration of primary teachers and recognized qualifications
15. The Respondents further rely on Section 19 of the [Employment Act](#) which vests the 2nd Respondent with the power to deduct wages as long as the deduction is authorized by any written law for the time being in force, collective agreement, wage determination, court order or arbitration award.
16. According to the Respondents, the first offers of employment to the ECDE teachers as communicated by the 2nd Respondent were hinged on procedural impropriety and as such were of no legal consequence. Section 75 of the County Government Act provides that if it comes to the attention of the County Public Service Board that there is reason to believe that any process or decision under



this Part may have occurred in an irregular or fraudulent manner, the County Public Service Board shall investigate the matter and, if satisfied that the irregularity or fraud has occurred, the County Public Service Board may- (a)revoke the decision; (b)direct the concerned head of department or lawful authority to commence the process afresh; or (c)take any corrective action including disciplinary action. The decision made in error of the law was of no legal effect, and the 2nd Respondent was authorized to take corrective action as aforesaid.

17. In line with Article 259 sub-article 11 of *the Constitution* of Kenya 2010, as provided under Section 38 of the Early Childhood Education Act, the salaries of the ECDE teachers was only payable upon consultation with the Salaries and Remuneration Commission. In so far as the first letters of offer were issued without such consultation, the decision to issue them was unprocedural, and therefore the same were void ab initio.
18. It is averred that in an effort to resolve the issues arising from the erroneous letters of offer of employment, the 2nd Respondent instituted a Joint Committee on Basic Education Training and Skills Development and Labour and Social Welfare on the 24th-25th of July 2023 whose task was to investigate and report the grievances by the ECDE teachers and make viable recommendations. The Joint Committee invited several stakeholders comprising the officials of the Applicant; the Chairperson County Public Service Board; and the Executive Committee member in charge of the ministry of education, training and skills development. A Report of the Joint Committee was prepared which held that the actions of the 2nd Respondent in issuing the ECDE teachers with letters of offer without a proper consultative meeting with the Salaries and Remuneration Commission as required under Section 38 of the *Early Childhood Education Act* was irregular and unprocedural and as such the said offers were held to be null and void.

Since Section 19 (f) of the *Employment Act* provides that wages may be deducted due to wage determination and collective agreements, the Petitioner cannot be seen to rely on the ultra vires decision made by the 2nd Respondent.

19. In response to the claim that they unlawfully dismissed ECDE teachers who they had employed all the way back in 2013, the Respondents acknowledge that they have the mandate under Section 74 of the *County Governments Act* to regulate appointment of persons on contract, volunteer, casual workers and interns in public offices. They also highlight Section 79 of the *County Governments Act* which enumerates the grounds upon which a public officer may be retired, namely: (a) on attainment of the mandatory retirement age prescribed under the relevant legislation or policy or as agreed upon between the county public officer and relevant appointing authority; (b)....; (c)....;(d)....;or (e)under a special retirement scheme agreed between a public officer or the representative of the public officer and the relevant appointing authority.
20. The 2nd Respondent rightfully issued retirement letters to those teachers who had attained the age of retirement pursuant to the aforementioned provisions. They also argue that some of the teachers did not possess the required qualifications and therefore could not sustain employment with the 2nd Respondent.

Determination

21. Following directions by the court that it would determine the Petition through written submissions, both parties filed their respective submissions.



Issues for determination

22. The Petitioner filed two sets of submissions. In their supplementary submissions dated 26th September 2025 where they identified the following issue for determination.
 - i. Whether the Respondents actions, conduct and /or decisions with regards to the unilateral deduction or variation of the Petitioners' members' salaries and the stoppage of payment of salaries of other members of the Petitioner are lawful and justified.
23. In their submissions dated 18th June 2025, the Petitioner set out the sole issue for determination as:
 - i. Whether the Petitioner herein has proved its case to the required standard and hence entitled to the orders sought in the instant petition.
24. The Respondents filed submissions dated 24th September 2025, where they identified three issues for determination, namely:-
 - i. Whether the letters of offer of employment dated the 1st day of February 2023 were valid and therefore whether the Respondents were in violation of the provisions of *the Constitution* of Kenya 2010 and the *Employment Act*.
 - ii. Whether the Respondents are culpable for unfair termination of the ECDE teachers.
 - iii. Whether the Petitioner has proved its case to the required standard and hence entitled to the orders sought in the petition.
25. The court found the issues for determination to be –
 - i. Whether the Respondents actions, conduct and /or decisions with regards to the unilateral deduction or variation of the Petitioners' members' salaries and the stoppage of payment of salaries of other members of the Petitioner are lawful and justified.
 - ii. Whether the Respondents are culpable for unfair termination of the ECDE teachers.
 - iii. Whether the Petitioner has proved its case to the required standard and hence entitled to the orders sought in the petition.

Whether the Respondents actions, conduct and /or decisions with regards to the unilateral deduction or variation of the Petitioners' members' salaries and the stoppage of payment of salaries of other members of the Petitioner are lawful and justified.

The appellant's submissions

26. That the recommendations and/or advice of the Salaries and Remuneration Commission are binding on employers in the public service including the 2nd Respondent herein is not disputed. The superior Courts have already settled the issue of the effect of the Commission's advisories. The Respondents herein claim and argue in their submissions that they acted as they did in unilaterally and arbitrarily slashing the salaries and remuneration of the members of the Petitioner herein on the basis of recommendations of the SRC and after consultation with various stakeholders including the SRC and the County Executive of the 2nd Respondent herein. And that after these consultations, they developed a comprehensive career progression guidelines manual in 2023 which proposed a well-defined career structure for the Early Childhood Development Education (ECDE) teachers in Machakos County. What we understand the Respondents to be saying is that the offers of appointment which the 2nd Respondent herein issued to the Petitioner's members on 1st February, 2023 and



which the said members accepted leading to the formation of a valid contract of employment were subsequently voided by the advisory of the SRC as contained in its letter dated 5th April, 2023. It is imperative to note, however, that in the new letters of offer of appointment dated 15th and 30th June, 2023, there is no mention at all of the reasons for the variations or reductions in the Petitioner's members' salaries. There is no mention of any procedural lapses or improprieties in the initial offers of employment dated 1st February, 2023 to warrant the issuance of new offers with new terms remuneration, such as the ones that the Respondents now want the Honorable Court to believe led to their decision to reduce salaries, being alleged failure to take into account SRC advisory on ECDE teacher salaries in the initial appointments or lack of consultation with relevant stakeholders in the initial recruitments. We thus submit that the reasons now submitted by the Respondents herein to justify their otherwise unlawful and unfair act is a mere afterthought aimed at cleansing an illegality and injustice. However, as is evident from the said letter from the SRC, nowhere in that letter did the SRC give an advisory or recommendation that the 2nd Respondent herein should reduce, slash, or vary - unilaterally - the salaries, remuneration, and benefits of its employees including the Petitioner's members. We submit that the letter does not constitute an advisory that is binding on the 2nd Respondent as alleged since in the letter, the SRC was simply requesting for information from the 2nd Respondent herein and not giving an advisory on salary structures or how much EDCE teachers ought to be paid by county governments. The 2nd Respondent's subsequent appointment letters issued on 15th June, 2023 and 30th June, 2023 containing new terms of remuneration and/or employment were thus of no effect as they constituted an unlawful and variation and/or reduction of the Petitioner's members' salaries. It is thus our submission that any unilateral changes in remuneration and terms of employment without informing the employee amounts to an unfair labour practice and violates the provisions of Section 10(5) of the *Employment Act*, 2007. This position has been upheld by the Supreme Court of Kenya in *Gatuma v Kenya Breweries Ltd & 3 others* (Petition E023 of 2023) [2024] KESC 52 (KLR) (Civ) (30 August 2024). In this case, Wairobi Gatuma Symon was employed from 3rd November, 1986 by Kenya Breweries Limited (KBL) as an Artisan. Grade F attached to the engineering department in its malting unit. He was declared redundant on 23rd April, 2003 following a business restructuring exercise that saw the delinking of KBL's malting operations from its beer business. Symon was offered a redundancy package amounting to Kshs. 2,083,852/=. Two days after being declared redundant, Symon received a letter of employment from Kenya Maltings Limited, KBL's sister company, for the position of a technical operator in its production department. However, this position came with a reduced salary from a gross of Kshs. 66,064/= to Kshs. 29,665/=. In *Symon Wairobi Gatuma V Kenya Breweries Limited* (supra), the apex Court held that:- "Employment is predicated on a written contract between an employee and an employer. Section 10(2) of the *Employment Act* 2007 provides that a written contract shall contain; (a) the name, age, permanent address and sex of the employee; (b) the name of the employer; (c) the job description of the employment; (d) the date of commencement of the employment; (e) the form and duration of the contract; Section 10(5) states that any revision and/or changes to the contract by an employer shall be in consultation with the employee, and through notification of the change in writing. Section 13 of the *Employment Act* provides the guiding principles for the variation of contracts which mandates the employer to conduct the following if it wishes to vary the terms of employment; a. issue prior notice to the employee; b. engages the employee in consultations; c. after consultation revise the contract to reflect the variation and should again notify the employee of the said changes in writing; d. the employee must consent to the variation through inference or in writing. Article 41 of *the Constitution* is transformative as it provides that every person has the right to fair labour practices including the right to fair remuneration, reasonable working conditions, to form, join or participate in the activities and programs of a trade union, and to go on strike. The *Employment Act* provides for various rights in relation to fair labour practices. Section 5(3)(b) of the Act specifically provides that; "(3)NO employer shall discriminate



directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee-(b)in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment". The Court of Appeal has made various pronouncements in relation to section 10 as read with section 13 of the *Employment Act* and specifically on the unilateral change in employment terms. In Board of Governors, Cardinal Otunga High School, Mosochi & 2 others v Elizabeth Kwamboka Khaemba [2016] eKLR the Court of Appeal in interpreting the provisions of section 13 of the *Employment Act* agreed with the trial court that the effect of the unilateral decision to change the terms of the contract of employment was tantamount to terminating the existing contract and therefore amounts to an unfair and unjustified termination... From the provisions of section 10(5) and section 13 of the *Employment Act* it is clear that any unilateral variation of the terms of an employment contract may be deemed as a repudiation of the contract and in case the same would lead to termination of employment the same may be deemed as constructive dismissal. The provisions of section 13 equally apply to remuneration. Any unilateral changes in remuneration and terms of employment without informing the employee will be tantamount to an unfair labour practice." 14. The Respondents herein have also averred that it was a term of the initial offers of appointment of the Petitioner's members dated 1st February, 2023 that the remuneration package was subject to revision by the Salaries and Remuneration Commission. While this is true as is evident on the face of the said letters, we submit that the Respondent's claim that these initial letters of appointment were issued irregularly and unprocedurally without the input or a consideration of the advice of the SRC or without a consideration of the 2021 scheme of service for ECDE teachers is baseless and misconceived. This is because it is evidently indicated by the 2nd Respondent herein on the face of the said letters dated 1st February, 2023 that:- "This offer is in line with the Scheme of Service for ECDE Teachers (2021) developed by the County Public Service Board in conjunction with the Council of Governors, Salaries and Remuneration Commission, Ministry of Education, Teachers Service Commission, among other relevant stakeholders." The same statement is to be found in the fresh letters of offer of appointment dated 15th and 30th June, 2023. Hence, it is not clear how, apart from the reduced salaries in the new letters, the new letters corrected the alleged, non-existent anomalies and improprieties in the initial appointment letters dated 1st February, 2023. Curiously, the Petitioner herein was never involved in the formation of the said scheme despite being a major stakeholder whose members' terms and conditions of service or employment would be affected by the same. Be that as it may, while we maintain that the SRC role in salary review and pay determination in the civil or public service is not in dispute, it is our submission that in the instant case, the appointment letters issued by the 2nd Respondent herein to the Petitioner's members on 1st February, 2023 were lawfully, procedurally, and regularly issued as it is clear that they were issued after factoring in and consulting with the relevant stakeholders including the SRC. The 2nd Respondent was thus in breach of the Petitioner's members' contracts of employment when it unilaterally varied the terms of their employment contracts without any notice or consultation with the said members as required by Section 10 (5) of the *Employment Act*, 2007. In the case of Ibrahim Kamasi Amoni v Kenital Solar Limited [2018] eKLR, the Court held that:- ".....For a reduction of salary to be valid, an employer ought to obtain the approval of an employee by communicating the reduction to an employee in a letter and causing the letter to be accepted by the employee. This is because salary is a fundamental term of employment whose reduction has negative impact on an employee's livelihood and should not be done arbitrarily or unilaterally by an employer." Moreover, the Respondents have by themselves annexed a report of the Joint Committee on Basic Education, Training, & Skills Development and Labor & Social Welfare dated 4th August, 2023, in which report the Joint Committee of the 1st Respondent's County Assembly observes as follows:- "It was clear that the CPSB acted in breach of the labor laws by giving appointment letters with specific gross salaries to the ECDE teachers, in February, 2023 where the said teachers benefited from the appointment for a period of five months



but later the said appointment letters were recalled by the board and new ones issued in June, 2023, with reduced gross salaries. ...the pay cut adversely affected the said ECDE teachers, a move that could lead to low morale of teachers thus affecting their performance in the ECDE centres. the teachers who had attained the age of 58 years were given a notice to exit service with effect from 31st December, 2023 yet they have been serving with the other young teachers. The Committee established that this was unfair because the exercise that was before the board was not to recruit new teachers but rather a conversion of those who had qualifications to permanent and pensionable terms. Therefore, it was only fair to convert them along with the others until the attainment of the mandatory retirement age of 60 years as provided for in the public service Act. ...the Committee is alive to the fact that the decision to reduce the ECDE teachers' salaries as undertaken by the CPBS in June, 2023 has plunged them into immense financial difficulties..." Moreover, regarding the issue of the termination of the employment of some of the Petitioner's members as detailed in the petition, the Respondents herein have submitted that the impugned terminations were substantively fair and reasonable. However, in the said Report of the County Assembly of Kitui dated 4th August, 2023, the Committee observes that:- "...the intention to terminate the services of the untrained teachers totaling to 656 is unfair basing on the fact that the same teachers have been rendering services to the County for a long period. In the opinion of the committee, such a decision was discriminative and of bad faith." The Committee then goes ahead and recommends that:- "...the CPBS reverts the decision to terminate the services of the 656 untrained teachers and instead they be given sufficient notice of one year effective from 1st July, 2023 up to 30h June, 2024 to acquire the minimum requirements for conversion to permanent and pensionable terms after which whoever will not have complied shall exit the service." In the circumstances, we submit that the Respondent's submission that the 2nd Respondent's termination of the employment of some of the members of the Petitioner as detailed in the petition was fair and procedural is unsupported by any evidence as their own document points to the unfairness of the whole process. The reasons given by the Respondents for the impugned terminations, stoppage of salaries, and dismissals, being lack of required academic qualifications and attainment of retirement age are contradicted by the report of the 1st Respondent's own County Assembly. The terminations cannot, therefore, stand the test of fairness under Sections 43, 44, and 45 of the Employment Act, 2007.

27. In any event, by arbitrarily and unilaterally varying and/or reducing the salaries of the Petitioner's members, the 2nd Respondent herein constructively dismissed the said members. In the case of Bakery Confectionery Food Manufacturing and Allied Workers Union (K) v Kenafric Industries Limited [2021] KEELRC 158 (KLR), this Honorable Court held as follows:- "The law is also clear on the procedure to be followed before a reduction of salary is deemed to be valid. Section 10(5) of the Employment Act provides as follows: '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. In Nakuru ELRC Petition No. 29/2016 Maxwell Miyawa & 7 Others v JSC (2017) eKLR the Court held as follows:- 'Further, in my view, the common law principle that a unilateral variation of an employment contract is unlawful and amounts to repudiation and or breach of contract, and the statutory requirement to consult with an employee where there is a variation to the employment contract, and more specifically to an essential of the contract such as duration and remuneration where the employee would be adversely affected are ingredients of and are subsumed in the fair labour practice principle. The Respondent also did not suggest that the variation(s) involved consultations with these Petitioners. The decision by the Respondent in regard to the contracts of the 7th and 8th Petitioners as conveyed through letters of 6 August 2013 were therefore not only unlawful for being unilateral but also for lack of consultation and therefore amounted to a violation of the right to fair labour practices as it took away vested rights and entitlements. In the instant case, it is not in dispute that the Respondent did not consult the grievants before reducing their salaries. This Court finds that indeed the action of the Respondent in unilaterally reviewing downwards the



salaries of its employees without consultation, was unfair and unjustified and amounts to an unfair labour practice." . In the instant matter, it is imperative to remember -as we have already demonstrated in the Petitioner's submissions dated 18th June, 2025 - that the 2nd Respondent herein, contrary to the mandatory requirement of Section 10(5) of the *Employment Act*, 2007, never ever consulted the Petitioner's members before effecting the variations or reductions in salaries. It only presented them with new appointment offer letters dated 15th and 30th June, 2023 on a take or leave it basis without any prior notice or consultation with the employees, an action which falls short of the requirement of the provisions of Section 4 of the Fair Administration Action Act, 2015 and Article 47 of *the Constitution*. And it is also important to be noted, Your Ladyship, that the mandatory consultation contemplated under Section 10(5) of the *Employment Act*, 2007 is with the employees and no one else. No such consultation with the affected employees or members of the Petitioner before the variation of their salaries has been demonstrated by the Respondents herein. So that, even assuming that the initial letters of appointment were tainted with procedural lapses or improprieties (unspecified) as alleged by the Respondents herein, which they were not, we submit nevertheless that the 2nd Respondent was still under a mandatory constitutional and statutory obligation to consult with and/or notify the Petitioner's members of the intention to vary the terms of their contracts of employment before proceeding to do so.

The respondent's submissions

28. Whether the letters of offer of employment dated the 1st day of February 2023 were valid and therefore whether the Respondents were in violation of the provisions of *the Constitution* of Kenya 2010 and the *Employment Act*? -The Respondents submit that the letters of offer dated the 1st day of February 2023 were invalid as they were tainted with procedural impropriety and therefore unenforceable. The Respondents submit that the offer for employment made to the members of the Petitioners on the 1st day of February 2023 was unprocedural as shown vide the reports annexed to the Replying Affidavit by the Chairperson of the 2nd Respondent in opposition to the Petition. The report dubbed as "Report on response to the statement by Hon. Cornelius Muthami Ngumbau M.C.A for MUI ward on alleged demotion and salary pay cuts for ECDE teachers dated the 4th day of August 2023" was conceived as a result of a Joint Committee appointed to investigate the plight of the members of the Petitioners and it was found that the 2nd Respondent had acted without regard to the recommendations of the Salaries and Remuneration Commission and further that the 2nd Respondent had failed and/or neglected to engage the County Executive to ensure the remuneration structures were fair, equitable, affordable and fiscally sustainable to the County Government of Kitui. The aforementioned letters also read in part as follows; "The Remuneration package may be revised as advised by the Salaries and Remuneration Commission (SRC) from time to time" Article 259 sub-article 11 provides as follows; "If a function or power conferred on a person under this Constitution is exercised by the person only on the advice or recommendation, with the approval or consent of, or on consultation with, another person, the function may be performed or the power exercised only on that advice, recommendation, with that approval or consent, or after that consultation, except to the extent that this Constitution provides otherwise." Similarly, Section 38 (2) of the *Early Childhood Education Act* provides that; (2) The County Government shall pay to early childhood education teachers employed in public education centers within the county such remuneration as it shall in consultation with the Salaries and Remuneration Commission determine. The Salaries and Remuneration Commission is established under Article 230 (1) of *The Constitution* of Kenya 2010 and the powers and functions of SRC are set out under Clause 230 (4) as follows: -"The powers and functions of the Salaries and Remuneration Commission shall be to :- a. Set and regularly review the remuneration and benefits of all State officers; and b. Advise the national and county governments on the remuneration and benefits of all other public officers" Sub Article 230 (5) sets out the guiding principles under which SRC is



to operate which include: - a. The need to ensure that the total public compensation bill is fiscally sustainable b. The need to ensure that the public services are able to attract and retain the skills required to execute their functions c. The need to recognize productivity and performance and; d. Transparency and fairness 20. The mandate of SRC is spelt out under Section 11 of the [Salaries and Remuneration Commission Act](#) which provides as follows:- “ 11 a) Inquire into and determine the salaries and remuneration to be paid out of public funds to State officers and other public officers; b) Keep under review all matters relating to the salaries and remuneration of public officers. c) Advise the national and county governments on the harmonization, equity and fairness of remuneration for the attraction and retention of requisite skills in the public sector; d) Conduct comparative surveys on the labour markets and trends in remuneration to determine the monetary worth of the jobs of public offices; e) Determine the cycle of salaries and remuneration review upon which Parliament may allocate adequate funds for implementation; f) Make recommendations on matters relating to the salary and remuneration of a particular State or public officer. In the case of Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 Others [2015] KECA 239 (KLR) The Court of Appeal observed as follows on Paragraph 27 and 28; “The very composition of SRC indicates that its advice has to be given great weight. The phrase “only on that advice...” used in Article 259(11) shows that the advice is a mandatory condition precedent for a valid exercise of power or function. If the word “advise” in Article 230 (4) (b) is construed to be not binding, the country would be returned to the pre-Constitution 2010 era which would defeat the purposes, values and principles of [the Constitution](#) and of the institutionalization of SRC under [the Constitution](#). It is conceivable and indeed inevitable that many employers in public sector would defy SRC’s advice leading to unimaginable financial crisis in the management of national wage bill. Having regard to the mischief that the institutionalization of SRC under [the Constitution](#) was intended to cure the principles of public finance and fiscal responsibility, the budgetary process and the complexity of salaries and benefits determination for public officers, I hold that the advice of SRC under Article 230(4)(b) on remuneration and benefits of all public officers is binding on national and county governments and any power or function exercised without that advice is invalid.” 22. The Court of Appeal in the Teachers Service Commission (TSC) case supra on paragraph 31 went on to state as follows; “In the instant case, [the Constitution](#) has conferred the duty to determine remuneration and benefits of public officers to specialized constitutional institutions which are democratically accountable, particularly the SRC. Those institutions have made a decision in accordance with their constitutional power which decision was not favourable to the unions. Although the doctrine of separation of powers cannot be invoked to undermine the operation of a specific provision of [the Constitution](#), it nevertheless requires that constitutional actors should respect the role and mandate of other constitutional actors by refraining from usurping their functions.” On paragraph 84 Justice Martha Koome went on to state as follows; “.....This in my view is what was intended by the framers of [the constitution](#) when they created the mandate of SRC which meant that not a single organ of national or county government would have an upper hand in setting their own remuneration and benefits.” The Supreme Court in the case of; National Hospital Insurance Fund Management Board vs The Kenya National Union of Commercial Food and Allied Workers & Another, Attorney General (Interested Party) (Petition No. E024 of 2024) affirmed the advisory role of the Salaries and Remuneration Commission when it comes to determining the salaries to be paid to persons in the public service at paragraph 94 as follows: “ Therefore, before rendering its advice on remuneration and allowance, the 2nd Respondent (the Salaries and Remuneration Commission) is required by law to engage in rigorous exercise that determines the suitability of proposed remuneration and allowances all in a bid to ensure the country’s fiscal health is sustainable. It would be absurd to have the 2nd Respondent, vested with ensuring the fiscal health of our country, demoted to a mere advice-minting body.” Following the finding of the Supreme Court in the National Hospital Insurance Case supra the advice by the Salaries and Remuneration Commission was binding on the Respondents



and therefore it could not be flouted or ignored. 25. This position was also affirmed by the Supreme Court in the case of *Muthuuri & 4 Others vs Attorney General & Others* (Petition 15 (E022) of 2021) [2023] KESC 52 (KLR) where the decision of the Court of Appeal in *Teachers Service Commission (TSC) vs Kenya National Union of Teachers (KNUT), Kenya Union of Post Primary Education Teachers (KUPPET), Salaries and Remuneration Commission (SRC) & Hon. Attorney General* held that; “according to Article 259(11) of *the Constitution* the National Police Service Commission had to seek the advice of the SRC before determining the remuneration and benefits of the National Police Service which advice was binding” Similarly, noting that this matter falls within the jurisdiction of the Salaries and Remuneration Commission as contemplated under Section 38 of the *Early Childhood Education Act* it follows that its recommendations to the 2nd Respondent to enter into consultation with the County Executive was binding. In light of Article 259 sub-article 11 of *the Constitution* of Kenya 2010 together with the aforementioned decided cases the offer for employment issued on the 1st day of February 2023 and prior to the advisory by the Salaries and Remuneration Commission were invalid and therefore of no legal effect and cannot bind the Respondents. It follows therefore corrective measures were employed by the Respondents in issuing new letters of offer for employment to the Petitioner’s members upon consultations with the Salaries and Remuneration Commission. Section 19 of the *Employment Act* vests the 2nd Respondent with the power to deduct wages as follows; Notwithstanding Section 17 (1) an employer may deduct from the wages of his employee (f) any amount the deduction of which is authorized by any written law for the time being in force, collective agreement, wage determination, court order or arbitration award.

Decision

29. The role of the Salaries Remuneration Commission on advice on remuneration for county workers was not in contest, and the authorities cited by the respondent are upheld. The issue is whether the respondent was right to rely on the circulars of SRC in the unilateral reduction of the salaries of the members of the petitioner. Section 10(1) of the *employment act* provides for contract agreement as follows- ‘10 (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.’”

Section 10(5) of the *Employment Act* states- ‘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’. Courts have interpreted consultation to mean genuinely seeking the employee’s views and opinions, providing clear information about the proposed change, and giving the employee an opportunity to respond. The respondent relied on the mandate of the Salaries Remuneration Commission (SRC), which apparently advised on new salaries. As per Article 230(4) of the Kenyan Constitution, 2010, the powers and functions of the Salaries and Remuneration Commission (SRC) include :To set and regularly review the remuneration and benefits of all State officers; and to advise the national and county governments on the remuneration and benefits of all other public officers. The court, however, holds that a contract of employment is a binding agreement between employee and employer, and the SRC is a third party. The employee’s salary cannot be reduced without the employee’s consent and in compliance with section 10 of the *Employment Act*. The employer ought to have complied with section 10 (5) of the *Employment Act* to effect the changes through consultation. The defence of reliance on the SRC circular to unilaterally reduce salaries was unacceptable, as it violated employees’ vested rights.

30. The respondent submitted deduction of salary is legal. The deduction referred to section 19 of the *Employment Act* is not equivalent to a reduction of salary. Section 19 prescribes the deductible amounts as follows- ‘1)Notwithstanding section 17(1), an employer may deduct from the wages of his employee



—(a) any amount due from the employee as a contribution to any provident fund or superannuation scheme or any other scheme approved by the Commissioner for Labour to which the employee has agreed to contribute; (b) a reasonable amount for any damage done to, or loss of, any property lawfully in the possession or custody of the employer occasioned by the willful default of the employee; (c) an amount not exceeding one day's wages in respect of each working day for the whole of which the employee, without leave or other lawful cause, absents himself from the premises of the employer or other place proper and appointed for the performance of his work; (d) an amount equal to the amount of any shortage of money arising through the negligence or dishonesty of the employee whose contract of service provides specifically or his being entrusted with the receipt, custody and payment of money; (e) any amount paid to the employee in error as wages in excess of the amount of wages due to him; (f) any amount the deduction of which is authorised by any written law for the time being in force, collective agreement, wage determination, court order or arbitration award; (g) any amount in which the employer has no direct or indirect beneficial interest, and which the employee has requested the employer in writing to deduct from his wages; (h) an amount due and payable by the employee under and in accordance with the terms of an agreement in writing, by way of repayment or part repayment of a loan of money made to him by the employer, not exceeding fifty per cent of the wages payable to that employee after the deduction of all such other amounts as may be due from him under this section; and (i) such other amounts as the Cabinet Secretary may prescribe.” The court, in interpretation of the foregoing, finds there is no reference to unilateral reduction of payable salary but prescribed deductions. In the instant case, it was not a deduction but a reduction of wages. The reduction amounted to a breach of contract, took away vested right of the salaries and is thus held as unacceptable conduct of employer in an open democratic society governed by *the Constitution*. The act is in breach of the right to fair labour practice under Article 41 of *the Constitution*. The court holds that the unilateral issuance of new contracts to reduce salary of the petitioners was illegal for offending section 10(5) of the *Employment Act* and in violation of fair labour practice under article 41 of *the constitution*.

Whether the Respondents are culpable for unfair termination of the ECDE teachers.

Petitioner's submissions

31. Regarding the 2nd Respondent's decision to stop the payment of salaries of the 9 members of the Petitioner described in the Petition, remove them from permanent and pensionable terms, and eventually dismiss them from employment without any reasons and without any due process including issuance of notice or even actual dismissal letters, we submit that this amounts to unfair and wrongful termination of employment of the said members. Section 41 of the *Employment Act*, 2007 provides that:- "(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. (2) Notwithstanding any other provision of this Part. an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make. Furthermore, Section 45 of the *Employment Act* provides that:- "(1) No employer shall terminate the employment of an employee unfairly. (2) A termination of employment by an employer is unfair if the employer fails to prove- (a) that the reason for the termination is valid; (b) that the reason for the termination is a fair reason- (i) related to the employee's conduct, capacity or compatibility; or (ii) based on the operational requirements of the employer; and



(c) that the employment was terminated in accordance with fair procedure. (3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated. (4) A termination of employment shall be unfair for the purposes of this Part where- (a) the termination is for one of the reasons specified in section 46; or (b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee." 28. In *Jared Aimba v Fina Bank Limited* [2016] eKLR, the Court of Appeal found that: "However, under section 45 and 41 of the *Employment Act*, termination for a valid reason or on grounds of misconduct is supposed to be accompanied by a fair process involving notification of the employee of the grounds and affording the employee an opportunity to be heard prior to termination."

Respondent's submissions

32. The respondent submitted that -Section 45 (4) of the *Employment Act* provides as follow; (4)A termination of employment shall be unfair for the purposes of this Part where— (a)the termination is for one of the reasons specified in section 46; or (b)it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee. Section 47 of the *Employment Act* provides as follows; Complaint of summary dismissal and unfair termination 5)For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer. Section 35 (c) of the *Employment Act* provides as follows; Termination notice (c)where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing. The Respondents submit that the Petitioner has not adduced enough evidence to show that its members were unfairly terminated, indeed the Petitioner has annexed letters of termination indicating the reasons for termination of employment and issuing the members of the petitioner with sufficient notice of more than one month of termination of employment. It is the humble submission by the Respondents that the Petitioners have only annexed 2 (two) letters of termination i.e Mary Musangi Musavi who indeed did not possess the relevant qualifications for employment as an ECDE teacher but was issued with a notice to continue in her employment service until the 31st day of December 2023. Similarly, the Petitioner has annexed a letter of termination for one Anna Kitondo Syengo who had already obtained the mandatory age of retirement according to her certificate of birth which and was also issued with a sufficient notice and was promised her terminal dues in accordance with the laws of Kenya. The Respondents humbly submit that the decision to terminate the ECDE teachers was substantively fair and reasonable. This action was made after following due procedure and was not an act of irrationality as alleged by the Petitioner herein. This Court in the case of *Kariuki vs Wildrups Group Limited & Another* [2024] KEELRC 1832 (KLR) at paragraph 47 pronounced itself on the issue of unfair termination as follows; "[47] Concerning termination of employment, it is common ground that under the provisions of the *Employment Act* 2007, for a termination of employment to pass the fairness test, it must be shown that the employer had a valid and fair reason to terminate the services of the employee and do so with a fair procedure". Therefore, the issue in contention is fairness in termination. Firstly, for a termination to be fair there must exist a reason for the termination. This is well brought out under Section 43 (1) of the *Employment Act*, 2007 and it provides; Proof of Reason for Termination (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45..From the reading of the aforementioned provision the two reasons that clearly come out to support the termination of the ECDE teachers are (i) lack of the required



academic qualifications for appointment and (ii) attainment of the mandatory retirement age and therefore ineligible for employment. Secondly, the reasons for termination must conform to Section 45 subsection 2 which further provides; (2) The reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee. From the forgoing we humbly submit that the said reasons were well captured in the letters of termination. We conclude that the termination has indeed passed the legal test prescribed under the aforementioned section and the Petitioner has not met the threshold required to prove unfair termination Thirdly, the Respondents followed due procedure in terminating the affected members of the Petitioner by issuing sufficient notice on other instances issuing more than one month's notice. The Respondents also undertook to pay terminal dues to the teachers who had reached the retirement age and this was well captured in the letters of termination. This goes in line with Section 79 of the *County Governments Act* which enumerates the grounds upon which a public officer may be retired. The actions by the Respondents were well within the confines of the law. In the case of Pius Machafu Isindu vs Lavington Security Guards Limited (2017) KECA 225 (KLR) Court of Appeal observed as follows; "We have carefully examined the testimony of the appellant in relation to the discharge of his evidential burden but we are afraid it does not lay the necessary foundation to require the employer's response..."

Decision

33. The petition further concerned 9 employees/members of the petitioner who were said to have been unfairly terminated vide stoppage of salary and removal from pensionable terms, and dismissed without reasons. and due process. I have perused the claim with respect to the 9 employees and did not find any constitutional issue about the alleged dismissal. These claims fall squarely under the Public Service Commission and, exercising power under section 56 of the Court procedural rules, the said 9 members are guided to present their cases to the said commission for the exercise of its mandate on appeals. I have considered the interim decision by Ongaya J and find that it did not state the said claims were constitutional. The claims ought to be considered on merit by the Public Service Commission, which has a statutory mandate to do so under section 77 of the *County Governments Act*.
34. In the upshot the court held that the petition with respect to the 81 members of the petitioner whose salaries were reduced unilaterally as merited. The claim of unfair dismissal by 9 of the members was held not to meet the constitutional threshold and is referred to Public Service Commission. The petitioner is at liberty to file the appeal according to the Public Service Commission rules. In conclusion, the court makes the following orders in the petition –
 - a. A declaration that the terms of offer of appointment contained in the Petitioner's members' letters of appointment and terms of engagement before 30th June 2023 are the proper and conclusive terms of the employment contract regulating the employment relationship between the affected Petitioner's members and the Respondents.
 - b. A declaration that the Respondents' decision and/or directive to unilaterally, arbitrarily and unlawfully vary and/or reduce the Petitioner's members' salaries is unlawful, unfair, and violates the affected Petitioner's members' fundamental rights and freedoms under Articles 27,28,41 and 47 of *the Constitution* and Sections 10,13 and 26 of the *Employment Act*.
 - c. A declaration that the Respondents have violated Sections 10 (5), 13(1) and 26 of the *Employment Act* 2007, the Regulation of Wages (General) (Amendment) Order 2022, and Section 138 (a) of the *County Governments Act* by unilaterally and arbitrarily altering the terms and conditions of service or employment of the Petitioner's members who are ECDE teachers in Kitui County to their disadvantage.



- d. A declaration that the 2nd Respondent's reduction in the salaries of the Petitioner's members amounts to an unlawful and unfair constructive dismissal of the said members of the Petitioner from employment.
- e. A conservatory order restraining the Respondents, either by themselves, employees, servants and/or agents from varying the terms of engagement of the Petitioners' members terms of service as confirmed in the employment of the Respondents and/or carrying to their disadvantage and detriment the terms of service of the Petitioner's members as obtaining in their letters of appointment.
- f. A mandatory order compelling the Respondents to compensate the affected members of the Petitioner by paying the said Petitioner's members affected by the impugned unlawful variation/reduction of salaries in full, the unlawfully varied/reduced salaries from 1st July 2023 to date, as long as the members are in service.
- g. A declaration that the 2nd Respondent's directive and/or decision to unilaterally vary/alter the salaries of the Petitioner's members constitutes a breach of the affected members' contracts of employment with the Respondent.
- h. The claims for 9 members on the grounds of unfair dismissal is held not to meet constitutional threshold and is referred to Public Service Commission for hearing and determination.

35. The court makes no order as to costs in the petition. Each party to bear own costs in the petition.

36. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 17TH DAY OF DECEMBER, 2025.

J.W. KELI,

JUDGE

In the presence of:

Court Assistant: Otieno

Petitioner: Oginga

Respondents – absent

