



**Ethics and Anti-Corruption Commission & 2 others v Attorney General & another
(Civil Appeal 143 of 2019) [2025] KECA 1199 (KLR) (4 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1199 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 143 OF 2019
F TUIYOTT, AO MUCHELULE & GV ODUNGA, JJA
JULY 4, 2025**

BETWEEN

**THE ETHICS AND ANTI-CORRUPTION COMMISSION 1ST APPELLANT
HALAKHE WAQO 2ND APPELLANT
MICHAEL MUBEA 3RD APPELLANT**

AND

**ATTORNEY GENERAL 1ST RESPONDENT
SOITA WASIKE 2ND RESPONDENT**

JUDGMENT

1. This Court has spoken consistently and emphatically on the same issues of law and fact that this appeal presents that it is needless to reinvent the wheel.
2. Soita Wasike (Soita or the 1st respondent) was on 1st August 2005 employed by the defunct Kenya Anti-Corruption Communication (KACC) and remained in employment until 2013 when his services were terminated by The Ethics and Anti-Corruption Communication (EACC or the appellant). This termination happened in the wake of the new constitution and establishment of EACC in place of KACC. It was a statutory requirement that the EACC conducts a fair, objective, and transparent vetting of all staff serving under KACC to determine their suitability for employment by the new Commission.
3. Soita challenged his termination vide Petition No. 31 of 2016 filed before the Employment and Labour Relations Court (ELRC) at Nairobi. In a judgment dated 12th October 2018 the ELRC (M. Onyango, J) found that termination to be unfair and awarded Soita compensation equivalent to 12 months salary. This appeal challenges both the finding of liability and quantum.



4. At the plenary hearing of the appeal, none of the parties were in Court and we determine this matter on the basis of the written submissions filed on behalf of the appellants and of the 1st respondent.
5. The challenge on liability cannot possibly succeed because at the time it acted, EACC was not quorate, a matter raised by Soita in his petition as follows:

“The purported secretary/chief executive officer (the 1st interested party) and deputy secretary operations (the 2nd interested party) of the 1st respondent’s commission are in office illegally as the appointment was done by a non-existing commission.”

6. Specifically Soita sought a declaration that:

“A declaration that the 1st and 2nd interested parties are in office illegally as they were appointed by a non-existing commission and thus had no authority to vet the petitioner.”

7. Responding to this, the appellant averred;

“as regards the issue of whether at the time of the petitioner’s termination of employment the Commission was properly constituted as per constitutional requirements, I am asked by the advocate on record for the Commission, which advise I verily believe that this Court has had previous occasions to address that issue and has come to the conclusion that the acts of the Commission, even in the absence of commissioners are valid.”

8. Even though the trial court’s finding on liability was not on the basis of the composition of the Commission, it is not a matter we can close our eyes to. Just recently, on 20th December 2024, this Court in Civil Appeal No. 41 of 2019, Ethics and Anti- Corruption Commission & 2 Others vs Henry Murithi Mwithia & Another(still unreported)on the same question and similar facts rendered itself thus:

“(21) Fortunately for us, the matter raised here has been previously resolved by this Court when it was confronted with the same circumstances and arguments as those made here. For its importance in resolving this first issue we quote at length the decision of this Court (Nambuye, Makhandia & Otieno-Odek, JJ.A) in Ethics and Anti-Corruption Commission v Nicholas Mwenda Mtwaruchiu & 8 others [2018] eKLR:

68. In our view, the Secretariat and staff of the Commission by themselves are not the Commission, but the Commissioners without the Secretariat and staff is the Commission. Subject to quorum requirement, a Commission is duly constituted when there are Commissioners in office. Conversely, a Commission is not duly constituted when there are only staff and Secretariat in office. For functional and operational aspects, there must be a duly constituted Commission with Commissioners before the Secretariat and staff can undertake any lawful actions. In the absence of the Commissioners qua Commissioners and subject to the quorum rule, the staff and Secretariat have no legal functionality and operational competence.



69. It is imperative to distinguish between composition of a Commission and the institutional or operational aspects of a Commission. The composition and constitutive aspect of a Commission is a constitutional issue. Whether a Commission is properly constituted is a constitutional question. This question is ascertained by determining whether there are persons appointed to be members of the Commission and if the persons are qualified to be members. The number of persons appointed to be members is pivotal. In so far as institutional and operational dimension of a Commission is concerned, the Commission as an institution is made up of Commissioners qua Commissioners and staff of the Commission. *The Constitution* governs the compositional aspect of the Commission.
70. In our view, the distinction between compositional aspect of a Commission namely Commissioners qua Commissioners and the functional and operational aspects of staff of the Commission leads us to conclude that the Court of Appeal decision in Michael Sistu Mwaura Kamau case supra is not per incuriam the Supreme Court dicta in Mable Muruli case (supra). The Supreme Court dictum is correct as it elucidates the functional and operational aspects of a Commission. The case does not deal with the compositional dimension of a Commission.
71. Having determined that the Court of Appeal decision is not per incuriam, we now turn to the pertinent facts and applicable law in this case.
72. The trial court made a finding that at the time of vetting of the Respondents and at the time when the decision to terminate their contracts of employment was made, there were only two Commissioners and thus the Commission was not properly constituted since the quorum is three Commissioners. Guided by this Court's decision in Michael Sistu Mwaura Kamau case supra, we find that the trial court did not err in finding that the Appellant was not properly constituted at the time of vetting the Respondents and any subsequent action based on the vetting process is null and void. In this regard, we note the dicta in Omega Enterprises (Kenya) Ltd -v- Kenya Tourist Development Corporation Ltd & 2 Others (1998) eKLR and Paramount Bank Ltd -v- Mohammed Ghias Qureishi, Civil Appeal No. 239 of 2001 where it was held that if an act is void, it is a nullity in law and any proceeding founded on such act is also a nullity in law.'
- (22) We are in agreement with the reasoning in this decision. We add, if we should, that in Clause 3.1 of the 'Internal Vetting Policy, Procedures and Guidelines' developed by EACC, it is expressly stated that the Commission shall constitute a vetting panel and secretariat. Under Clause 3.1.1 the panel would comprise of the chairperson, two members of the Commission, the CEO, a Deputy Secretary and 2 other co-opted members. While the quorum of the panel would be at



least five members, the panel could not be lawfully constituted, in the first place, in the absence of a properly constituted Commission. In addition, the policy, procedures and guidelines for the vetting process could not be developed by persons other than the commissioners sitting in quorate meeting. In this regard, one of the functions of the commissioners is to assist the Commission in policy formulation - (section 11(6)(a) of the EACC Act).”

9. So it has to be here.
10. On the second question of damages, it is common ground that at the time of termination Soita was paid one (1) month’s salary in lieu of notice as per his Contract of Service together with service gratuity for the period served as well as commutation into cash of 11 days leave already earned. In addition, he was issued with a certificate of service.
11. In the Memorandum of Appeal, EACC challenged the award of 12 months’ salary as follows;

“The Learned Judge erred in law and fact in awarding the 1st Respondent 12 Months salary as compensation, a remedy which was not available to the 1st Respondent in the contract of employment”
12. In submissions filed on behalf of Soita it is contended, and correctly so, that what EACC is arguing is not that the award was excessive but that the compensation was not available at all in the circumstances of this matter. We nevertheless take the view that the grievance of EACC invites us to determine two related issues: is this one such circumstance when compensation under section 49(1)(c) is deserved; and if so, what compensation would be reasonable. To simply determine whether or not compensation was deserved without discussing the compensation awarded by the ELRC would be to read the ground of appeal rather narrowly.
13. We again turn to the decision in Ethics and Anti-Corruption Commission & 2 Others vs Henry Murithi Mwithia & Another (supra) for answers to the two questions. There, the Court had occasion to consider the question of quantum on similar facts. We think that we need to quote the relevant portion in extenso;

“

“(31) Caselaw has been consistent that where there is an exit clause, the damages ought to be equivalent to wages that would have been paid during the notice period unless there is justifiable reason, to be stated and explained, for awarding more. See for example this Court’s decision in Kenfreight (E.A.) Limited v Benson K. Nguti [2016] eKLR where it was held:

Although there were attempts by this Court before the enactment of the *Employment Act*, 2007 to break away from the traditional thinking, there was no impact. For instance in *C.P.C. Industrial Products v Angima*, Civil Appeal No. 197 of 1992, the Court (Gicheru, (as he then was), Kwach and Muli, JJ.A), in a departure from the previous decisions, held that the principle that damages will only be limited to the period of notice agreed between the parties could only apply if, in exercising its right to terminate the appointment, the employer was not actuated by ulterior motives or did not act in bad faith; and that if the employer acted maliciously, oppressively or even callously the court was bound to consider that fact in assessing the damages the employee would be entitled to for wrongful termination or dismissal. Muli, JA in his judgment drew a distinction between ordinary common employment and professional or career employees who may face challenges to obtain an alternative equivalent employment after dismissal. He explained that;



“In all the above categories no account should be entertained for circumstances of harshness or oppression accompanied by dismissal or injury to the employee’s feelings and also for taking into consideration the fact that the dismissal would make it more difficult for the terminated employee to obtain an alternative employment. The dismissed employee, being a prudent and reasonable person, must take all reasonable measures to obtain an alternative employment to mitigate his damages.....”

Where the contract of service contains a termination clause and the employment is terminated otherwise than in accordance with the termination clause clearly, there is a breach of the contract of service. The termination is also unlawful. The terminated employee is entitled to compensation, indemnity, general damages, call them what you may, for the loss he suffers had he been allowed to serve for the period of the termination clause. See *Ombanya v Gailey & Roberts* (1974) EA 522”.

In that case the Court was unanimous that the respondent was entitled, in addition to terminal benefits, to general damages equivalent to 12 months gross salary for wrongful dismissal.”

.....

33. We return the following view. The rationale based on the lapse of time between the date of the judgment and the time of termination of the contract flies in the face of the evidence of record which shows that Mwithia was promptly paid his dues in April 2013 which was in the same month as his letter of 3rd April 2013 accepting the termination and just a month after the termination itself. Secondly, while it is true that the vetting process was carried out by a body without authority and the process itself could

have been flawed, there is no iota of evidence that the appellants acted in bad faith, maliciously, callously or oppressively or that their conduct was egregious. And while unlawful termination of employment is often a grave matter, an award of damages that leaves the grieving employee in a better monetary position than he would have been had the employment been lawfully brought to an end must be well anchored, logically and clearly explained. So, in this case the award of pay for 12 months’ salary and not the contractual period of 3 months’ salary. On our short analysis, the trial court manifestly misapprehended the evidence and considerations available to it when it exercised its discretion in the award of damages equivalent to 12 months’ pay and the award is therefore susceptible to interference and setting aside by us. In this, we are not alone as this Court in *Ethics and Anti- Corruption Commission v Nicholas Mwenda Mtwaruchiu & 8 others* (supra) in not dissimilar circumstances stated:

“In the instant appeal, taking into account that the Respondents have all been paid salary in lieu of notice and bearing in mind that the Respondents were employed on fixed term contracts, we are of the view that a one-month salary compensation for unfair termination for each of the Respondents is sufficient and adequate compensation..... This Court in *Kenya Ports Authority -v- Silas Obengele*, Mombasa Civil Appeal No. 38 of 2005 and in *Kenya Revenue Authority -v- Menginya Salim Murgani*, Nairobi Civil Appeal No. 108 of 2010 was emphatic that no damages are awardable for unlawful termination of a contract until the age of retirement. There is no compensation, certainly not the money an employee would have earned until attaining the retirement age. There are several imponderables which affect an award of damages in such cases. (See also *Mary Mutanu Mwendwa -v- AyudaNinos De Africa-Kenya* (Anidan K [2013] eKLR).



93. Comparatively, in *Butler -v- Pennsylvania*, 10 How. 402: 13L. ed. 472 the US Supreme Court rejected the argument that an official is entitled to pay for a period he expects to work, but has not in fact worked.
94. Guided and persuaded by the afore mentioned authorities, we find that the Respondents claim for unpaid salary for the lower of the retirement age of 60 years; unpaid leave allowance until retirement; unpaid medical cover until retirement and unpaid employer's contribution to NSSF until retirement cannot be maintained in law.
95. Penultimately, we find that the Respondents failed to prove violation of any of their fundamental rights and freedoms as we take into account the provisions of Section 34 (1) and (2) of the EACC Act. In this context, it is the individual contracts of employment of the Respondents that is the operative instrument."

34. Just as the Court in that matter, Mwithia having been paid three months' salary in lieu of notice, gratuity and leave allowance, we come to the conclusion that an award equivalent to one month's salary adequately compensates him for the infraction suffered in the hands of an ill constituted body.

14. No reason was tendered by the trial judge for making an award equivalent to 12 months and on our part, see none.
15. The upshot is that we find an award equivalent to one month's salary adequate compensation to Soita for the infraction he suffered.
16. The appeal partially succeeds. The award equivalent to 12 months' salary is hereby set aside and in its place we make an award for one month's salary which shall be subject to statutory deductions. The parties to bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JULY 2025.

F. TUIYOTT

..... **JUDGE OF APPEAL**

A. O. MUCHELULE

..... **JUDGE OF APPEAL**

G. V. ODUNGA

..... **JUDGE OF APPEAL**

I CERTIFY THAT THIS IS A TRUE COPY OF THE ORIGINAL.

SIGNED

DEPUTY REGISTRAR.

