



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & KIAGE JJA.)

CIVIL APPEAL NO. 241 OF 2015

BETWEEN

CHAIRMAN BOARD OF DIRECTORS (NATIONAL WATER CONSERVATION & PIPELINE CORPORATION).....APPELLANT

VERSUS

ENG. MESHACK M. SABOKE.....1ST RESPONDENT

PERMANENT SECRETARY MINISTRY OF WATER AND

IRRIGATION.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

(Appeal from the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Nairobi (N. Nduma, J.) dated 30th January, 2015

in

Employment and Labour Relations Court No. 847 of 2012)

JUDGMENT OF THE COURT

The appeal arises from the Judgment of the Industrial Court of Kenya (now the Employment and Labour Relations Court) (ELRC) Nairobi, **Mathew N. Nduma**, Principal Judge (as he then was) dated 30th January, 2015.

The background to the appeal is that the first respondent was employed as an assistant engineer by the 2nd respondent on 28th September, 1987 and confirmed on 3rd September, 1991. He was subsequently seconded to the appellant in the same capacity. On 3rd October, 2008, he signed a three year contract of employment with the appellant as a Managing Director (M.D), a position he held for only one year before being sent on compulsory leave effective 30th October, 2009. On the 22nd day of January, 2010, he received a letter inviting him to appear before the appellant’s Human Resource & General Purpose Committee (HR&GP) on 28th January, 2010, to respond to allegations of financial mismanagement and poor leadership in the discharge of his official functions as the M.D. On the 28th January, 2010 he did appear before the said Committee and without any formal charges being framed and put to him, the Committee members put questions to him to which he responded to the best of his knowledge and ability.

On 19th February, 2010, the appellant’s Board of Directors (the Board) served the 1st respondent with notice to show cause inviting him to respond in writing to allegations leveled against him to which he responded vide his letter dated 24th February. He received no further communication from the appellant regarding the matter. On 23rd May, 2012, he filed a claim against the appellant, 2nd and 3rd respondents. When he was served with the appellant’s rebuttal to his claim, he learned that he had been summarily dismissed from his employment following a resolution passed by the appellant’s Board of Directors (the Board) in a meeting held on 23rd April, 2010. The dismissal was sanctioned by the Minister and was allegedly communicated to him vide a letter dated 4th May, 2010, which he asserted, was never received by him.

He therefore sought a declaration that his employment with the appellant had been unprocedurally, unfairly, wrongfully and unlawfully terminated and sought orders for payment as specified in the claim.

In rebuttal to the 1st respondent's claim, the appellant filed a response dated 2nd July, 2012, confirming that the 1st respondent had been employed by the 2nd respondent and subsequently seconded to them on permanent and pensionable terms. He was subsequently employed as an M.D on a three year contract of service effective 3rd October, 2018. He had served in that position for only one year when he was sent on compulsory leave effective 30th October, 2009. The appellant also confirmed that vide a letter dated 22nd January, 2010, the 1st respondent was invited to appear before its HR&GP Committee to respond to allegations of financial mismanagement and poor leadership in the discharge of his official functions as its M.D; that he did appear before the said committee on 28th January, 2010. The committee after due deliberations compiled a report and forwarded the same to the Board for its deliberations on 10th February, 2010. On 19th February, 2010 the Board served him with a show cause letter inviting him to respond in writing to allegations leveled against him, which he did vide a letter dated 24th February, 2010. The Board met again on 23rd April 2010 and upon due deliberations over his responses resolved to summarily dismiss him from its employment for what the Board termed as loss of trust and confidence in him as an employee. The Board's resolution was then communicated to the Minister for sanctioning vide a letter dated 28th April, 2010. By a letter dated 3rd May, 2010, the Minister conveyed his concurrence with the Board's resolution. The Board in turn conveyed the Minister's concurrence with its resolution to the 1st respondent vide a letter dated 4th May, 2010. On account of the above averments, the appellant denied responsibility to meet the 1st respondent's claim as laid against them. According to them, the 1st respondent's contract of service with them had been procedurally, fairly and lawfully terminated.

The 2nd & 3rd respondents on the other hand in their rebuttal to the 1st respondent's claim denied any knowledge of the terms and conditions of the contract executed between the 1st respondent and the appellant. They did not know that he was firstly sent on compulsory leave and then subsequently summarily dismissed from his employment with the appellant.

In reply to the appellant's, 2nd and 3rd respondents' rebuttals, the 1st respondent joined issues with them on those rebuttals.

The cause was canvassed by way of oral testimony and written submissions. The 1st respondent Engineer **Meshack M. Saboke**, gave evidence as sole witness in support of his claim, while the appellant, 2nd and 3rd respondents called three (3) witnesses namely, **Margaret Ratemo (RW1)**, **David Jakaiti (RW2)** and **Dr. Florence Mukonyo Musau (RW3)** in support of their rebuttals.

In support of his claim, the 1st respondent reiterated the averments in his statement of claim as already highlighted above. He denied being: called for interview before any investigative authority in connection with allegations cited as the reason for sending him on compulsory leave; called before the appellant's Board to respond to any formal charges; furnished with any investigative report on the alleged financial mismanagement and poor leadership. He reiterated that when he received the appellant's rebuttal in response to his claim filed on 23rd May, 2012, he learned that he had been summarily dismissed from his employment following the Board's resolution of 23rd April, 2010; subsequently sanctioned by the Minister on 3rd May, 2010 and allegedly conveyed to him vide a letter dated 4th May, 2010 which he never received.

Turning to the evidence, in rebuttal, **Margaret Ratemo (RW1's)**, role was limited to originating an internal memo dated 9th September, 2011 regarding the 1st respondent, and attending the appellant's Board meeting held on 23rd April, 2010 in which the Board found the 1st respondent's response to the accusations leveled against him unsatisfactory and resolved to summarily dismiss him from his employment for loss of trust and confidence in him as an employee.

David Jakaiti (RW2), attended the HR&GP Committee meeting held on 28th January, 2010 during which the 1st respondent appeared in person and admitted signing blank cheques while away from office on official duties; the Board's meeting held on 10th February, 2010 in which the Board resolved to serve the 1st respondent with a show cause letter dated 19th February, 2010 and which he confirmed was responded to by the 1st respondent's letter dated 24th February, 2009; and the Board's meeting held on 23rd April, 2010 in which the Board resolved to summarily dismiss him from his employment. In cross-examination, **Mr. Jakaiti** admitted that the HR&GP committees' report on the basis of which the Board summarily dismissed the 1st respondent from his employment had not been properly authenticated by all the required signatories.

Dr. Florence Mukonyo Musau (RW3) on the other hand, stated that she was not involved in the disciplinary proceedings undertaken by both the HR&GP Committee and the Board against the 1st respondent. Her testimony was based on records held by the appellant on the issue. She confirmed that the HR&GP Committees' letter dated 19th January, 2010 pursuant to which the 1st respondent appeared before the said committee on 28th January, 2010 for interrogation contained no formal charges; that the 1st respondent responded to the Board's show cause letter to him dated 19th February, 2010 vide his response dated 24th February, 2010; that although the disciplinary proceedings against the 1st respondent were triggered by an alleged Audit report, she had nothing to show that the contents of the said Audit report were ever brought to the 1st respondent's attention before he either appeared before the HR&GP Committee on 28th January, 2010 or when he filed his response to the show cause letter dated 24th February, 2010. She also had nothing to show that the Board invited the 1st respondent to elect whether to appear and defend himself before the Board in person or in writing as all that the letter of 19th February, 2010 conveyed to him was for him to respond in writing. She conceded that there were records to show that the Board deliberated over the 1st respondent's response of 24th February, 2010 in its meeting held on 23th April, 2010 and summarily dismissed him. She confirmed **Jakaiti's (RW2's)** testimony that the H/R&GP Committees' report on the basis of which the Board acted to summarily dismiss the 1st respondent was not properly authenticated by all the authorized signatories. At the conclusion of the trial, the trial court assessed and analyzed the record, identified issues for determination and made findings that since the 1st respondent ceased to be an employee of the 2nd respondent as soon as he accepted and signed the contract of employment between himself and the Corporation, the Corporation had authority to discipline him and to terminate his services subject to compliance with the appellant's staff Rules, Regulations and the Employment Act, 2007 (the Act); that 1st respondent's

secondment to the appellant severed the employment ties with the 2nd respondent subject to any accrued obligations such as payment of pension; that since the contract document executed between the 1st respondent and the corporation did not make any reservation with respect to the 1st respondent's previous employment with the Ministry. The 2nd respondents' concurrence to the appellant's summary dismissal of the 1st respondent from his employment was superfluous.

The trial court construed **sections 40(2), 41(2), 43(1), 44(1), (3) & (4) & 45(1)** and applying these to the record made findings thereon that, **Section 44(3) & (4)** obligated the appellant to grant the 1st respondent a hearing either alone or through a chosen representative before arriving at the decision to summarily dismiss him from his employment; that service of the notice to show cause on the 1st respondent by the appellant and service of the 1st respondent's response to the notice to show cause to the appellant did not, in the trial court's view, operate as a substitute for the mandatory right to a hearing provided for under **section 40(2)** of the Act; that in law, once the employer fails to follow this mandatory procedure, the termination or summary dismissal of an employee becomes substantively and procedurally unfair; that on the record before the trial court the appellant had not discharged the onus placed upon it in terms of **sections 43(1)** and **section 45 (1)** of the Act, with regard to the mode of procedure employed before summarily dismissing the 1st respondent from his employment and on that account found that the summary dismissal of the 1st respondent from his employment was substantively unlawful and procedurally unfair.

Having faulted the procedure employed by the appellant to summarily dismiss the 1st respondent from his employment, the trial court proceeded to grant appropriate reliefs. Reinstatement was declined for the reasons given. In lieu thereof the trial court awarded compensation for the unserved period of eighteen (18) months to the total tune of Kshs. 460, 600.00x18=8,280,000.00; commuter allowances of Kshs. 20,000.00x5 months Kshs.100,000.00; consolidated allowances of Kshs.60,000x5=300,600.00; one month's salary for leave days earned but not taken Kshs. 460,000.00; gratuity for the completed term to the total tune of Kshs. 1,116,000.00; notice pay of three months' salary to the total tune of Kshs. 1,380,000.00; accrued terminal benefits payable by the 2nd respondent under the prevailing pension scheme up to and including the 31st October, 2008 when he started working on a fixed term contract, to be computed by the 2nd respondent, and filed in court within thirty (30) days of the Judgment for the court's consideration.

The appellant was aggrieved and filed this appeal raising nine (9) grounds of appeal which may be condensed into the following: It is the appellant's complaint that the learned Judge erred in law and in fact:

(1) In ordering specific performance of the 1st respondent's contract of employment with the appellant by erroneously holding that the 1st respondent is entitled to pay equivalent to full salary for the remainder of the unserved period of his contract of service with the appellant in the absence of a contract term to that effect or without any justified or exceptional circumstances as provided for in the Act.

(2) In misapprehending the meaning and extent of the invocation and application of the doctrine of legitimate expectation, and in the process erroneously held that the 1st respondent's legitimate expectation was to serve the full term of his contract of employment with the appellant.

(3) In erroneously holding that the 1st respondent is entitled to payment of compensation for the failure to serve him with a notice for summary dismissal not provided for either in the contract of employment between the 1st respondent and the appellant or the Act.

(4) In erroneously holding that the appellant did not accord the 1st respondent an opportunity to be heard prior to his summary dismissal from his employment for the failure to grant him an oral hearing.

(5) By holding against the weight of evidence on the record that the 1st respondent's summary dismissal from his employment was substantially unlawful.

The appeal was canvassed by way of written submissions fully adopted by learned counsel for the appellant and the 1st respondent without highlighting. Learned counsel **Mr. Nicholas Malonza** appeared for the appellant, learned counsel **Mr. E.A. Ongicho** appeared for the first respondent, while learned counsel **Mr. Siro** appeared for the 2nd and 3rd respondents.

The appellant relied on the case of **Directline Assurance Co. Limited versus Wachira Ichaura [2016] eKLR**; and **CMC Aviation Limited versus Mohammed Noor [2015] eKLR**, in support of their submission in support of ground 1 of the appeal that since the 1st respondent's contract with the appellant contained a three year fixed term with a termination clause, it was erroneous for the trial court to grant the 1st respondent salary compensation for the remainder of the unserved contract period.

In support of grounds 2, and 9 of the appeal, the appellant cited the High Court decision in **Coastal Bottlers Limited versus Commissioner of Domestic Taxes [2008] eKLR** for the holding that:

“A legitimate expectation is said to arise from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably, expect to continue”

And the Supreme Court of Kenya decision in **Communication Commission of Kenya & 5 others versus Royal Media Services Limited & 5 others [2014] eKLR** for the restatement of the principle on legitimate expectation as follows:

(a)there must be an express, clear and unambiguous promise given by a public authority.

(b) The expectation itself must be reasonable.

(c) The representation must be one which it was competent and lawful for the decision maker to make; and

(d) There cannot be a legitimate expectation against a clear provision of the law or the constitution;

Applying the above threshold to the record, the appellant faulted the trial court for improperly invoking and applying the doctrine of legitimate expectation and erroneously using it to award compensation to the 1st respondent for the unexpired period of the contract in the absence of a provision in the contract providing for such payment or a relevant provision of law to support that finding.

In support of ground 3 of the appeal, the appellant faulted the trial court and urged us to find that by awarding the 1st respondent full compensation for the unexpired term of the contract, the trial court had in effect erroneously awarded to the 1st respondent the remedy of specific performance of the contract in the absence of a specific term of the contract providing for the same or alternatively in the absence of any justification or exceptional circumstances as provided for in the Act.

In support of ground 4 of the appeal, the appellant relied on the persuasive cases of **Alfonse Maghona Mwachanya versus Operation 680 Limited [2013] eKLR**; and **Mary Mutanu Mwendwa versus Ayuda Ninos DeAfrica-Kenya (Anidan) [2013] eKLR** and faulted the trial court, firstly, for creating a nonexistent distinction between fixed term contract employees and those employed under permanent and pensionable terms; and secondly, for the failure to appreciate that this was not one of the issues raised for determination before the trial court.

In support of grounds 5 of the appeal, the appellant faulted the trial court for awarding three months' salary as compensation for the appellant's failure to serve on the 1st respondent notice for summary dismissal from his employment not provided for in law; and secondly, for the failure to apply the correct rate provided for in **clause 26** of the contract of employment namely; Kshs. 300,000/- basic salary +80,000 house allowance =380,000x 3 months bringing the correct total amount payable for notice pay to Kshs. 1,140,000.00. as opposed to what the trial court had allowed of Kshs 1,380,000.00.

In support of grounds 6, 7 &8 of the appeal, the appellant relied on the case of **Kenya Revenue Authority versus Menginya Salim Murgani [2010] eKLR**; the case of **Judicial Service Commission versus Gladys Boss Sholei & another [2014] eKLR** , both on fair hearing and submitted that the 1st respondent was accorded a fair hearing in person before the HR&GP Committee and in writing before the Board when he filed his response of 24th February, 2010 to the Board's letter to him of notice to show cause dated 19th February, 2010. The trial court was also faulted for holding that the reason advanced by the appellant for summarily dismissing the 1st respondent from his employment was not justifiable as the same was well supported by both the evidence relied upon by the appellant and the 1st respondent's own admission that he signed blank cheques while away from office on official duties outside the country which were used to defraud the appellant

In opposition to the appeal, the 1st respondent adopted the same pattern of submission as that adopted by the appellant of addressing each clustered grounds of appeal separately. In opposition to ground 1of the appeal, the 1st respondent urged us to affirm the trial court's award of 18 months' full salary as compensation for theunserved period of the contract as, **section 49(4) (d)** of the Act, allows the court in exceptional circumstances to order specific performance of a contract of employment, which threshold, in the 1st respondent's view, the 1st respondent had met to warrant the trial court's exercise of discretion to grant the said relief in his favour.

In opposition to grounds 2, 3 and 9 of the appeal, the 1st respondent submitted that the trial court properly invoked and applied the doctrine of legitimate expectation when it allowed full salary compensation in favour of the 1st respondent for the remainder of the 18 months' unserved period of the contract upon finding that his summary dismissal from his employment by the appellant was unfair and therefore unlawful.

In opposition to ground 4 of the appeal, the 1st respondent urged us to reject the appellant's submission in support of this ground contending that these were merely speculative, especially when the evidence on the record is clear that the 1st respondent was unprocedurally, unfairly and wrongfully summarily dismissed from his employment.

In opposition to ground 5, the 1st respondent maintained that notice pay was properly awarded firstly because the contract provided for notice pay of three months in lieu of notice, and secondly for the appellant's failure to discharge the onus placed upon it to justify the lawfulness of its actions against the 1st respondent in terms of the prerequisites stipulated for in **sections 41, 44 (3) and 44(4)** of the Act.

In opposition to grounds 7 and 8 of the appeal, the 1st respondent urged us not to disturb the trial court's finding that **section 41** of the Act was not complied with. According to the 1st respondent, the meeting of 28th January, 2010 was merely a forum in which the 1st respondent was informed of the appellant's intention to conduct disciplinary proceedings against him. Proper disciplinary proceedings according to the 1st respondent were those conducted by the Board before which the 1st respondent was never granted audience to defend himself.

No submissions were made by **Mr. Siro** on behalf of the 2nd and 3rd respondents.

This is a first appeal. Our mandate is to re-appraise the evidence and draw out own inferences of fact. See **Rule 29(1) (a)** of CAR and also **Selle & Another versus Associated Motor Boat Company & others [1968] EA 123** where the Court stated:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own

conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E.A.C.A 270.)"

We have considered the record in light of the above mandate, rival submissions and principles of law relied upon by the respective parties in support of their opposing positions. The issues that fall for our determination have been summarized above.

With regard to issue number 1, the position in law, which we adopt fully, was stated by the court in the case of **Directline Assurance Co. Limited versus Jeremiah Wachira Kihara** (supra), that compensation for an unserved period of a contract of service is only available where there is no termination clause in the contract permitting either party to bring the contract prematurely to an end. In light of the above guiding principle, the only legitimate compensation that the 1st respondent was entitled to was limited to three months' notice or payment of salary in lieu of notice.

With regard to issue number 2, we adopt fully the decision of the Supreme Court of Kenya in the case of **Communication Commission of Kenya & 5 others versus Royal Media Services Limited & 5 others** (supra), that the only legitimate expectation of both contracting parties in an instance where the contract is prematurely brought to an end is a three months termination notice or payment of three months' salary in lieu of notice. The finding by the trial court that 1st respondent had a legitimate expectation to receive salary compensation for the remainder of the unserved contract was erroneous in the circumstances.

On summary dismissal, **Section 44** of the Employment Act provides that summary dismissal takes place when an employer terminates the employment of an employee without notice or with less notice period than that to which the employee is entitled to by any statutory or contractual term. **Subsection (3)** allows an employer to dismiss an employee summarily when the employee has by his conduct, indicated that he had fundamentally breached his obligation arising under the contract of service. **Section 44(4) (c)** provides for summary dismissal of an employee if an employee willfully neglects to perform any work which it was his duty to perform and if he carelessly and improperly performs any work which from its nature it was his duty under his contract to have performed carefully and properly.

Section 45 of the Employment Act provides for unfair termination of employment. A termination of employment by an employer is unfair in terms of **section 45**, 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 procedures.”

In light of the above provision, termination of employment will be unfair if the court finds that in all the circumstances of the case, it is based on invalid reasons or if the reason itself or the procedure of termination are themselves not fair.

Section 43 of the Employment Act deals with proof of reasons for termination placing the burden on the employer to prove the reasons for termination failure to which termination is deemed unfair within the meaning of **section 45**. The reason for termination of contract is the matter 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.

The procedure an employer is obligated to employ when considering termination or summary dismissal of an employee from his employment was aptly summarized by the Court of Appeal in **Janet Nyandiko versus Kenya Commercial Bank Limited [2017] eKLR** which we find prudent to adopt and reproduce herein as follows:-

“Section 45 of the Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity.

The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. Indetermining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41, the previous practice of the employer in dealing with the type of circumstances which led to the termination and the existence of any warning letters issued by the employer to the employee.

Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands

the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations leveled against him by the employer."

The trial court faulted the appellant on the mode of procedure employed to summarily dismiss the 1st respondent from his employment for the failure to accord him audience; that is an oral hearing and thus rejected the oral representations the 1st respondent gave to allegations leveled against him before the HR&GP Committee on the one hand and the response he gave in writing to the notice to show cause terming these in-sufficient and below the threshold permitted for by the law. In the case of **Kenya Revenue Authority versus Menginya Salim Murgani** (supra), the employers termination of an employee's contract was sustained on appeal because, there was a clear demonstration that the employer in exercising its power under the contract, did follow the procedure outlined in the code of conduct in laying a charge against the employee. It also sought a written explanation and there after availed to the employee the right of appeal which he invoked, but his appeal was unsuccessful. In **Bett Francis Bargetuny & another versus Teachers Services Commission and another [2015] eKLR**, termination of an employee's employment by the employer was sustained because; each of the appellants therein appeared in person before the disciplinary panel and defended themselves. Their evidence was considered before a decision was arrived at which in the court's view, satisfied the proposition that where an employer accuses an employee of misconduct by way of a query and allowing the employee to respond to the query before a decision is taken against such an employee, satisfied the requirement for fair hearing.

In the case of **Judicial Service Commission versus Gladys Boss Shollei & another** (supra), the Court sustained the employer's action against an employee because, there was sufficient demonstration that the employer had taken sufficient steps to ensure that the employee was informed of the case against her and given an appropriate opportunity to present her defence, but that the employee had exploited the opportunity by presenting written representations and appearing before the panel with her advocate. There was also demonstration that the employee chose not to argue her substantive defence before the employer but pursued what she called objections to the proceedings. In light of all the above observations, the Court ruled that since the employer had sufficient information regarding the employees substantive defence in her detailed written defence, the employer properly exercised its discretion when assessing the employee's defence and arrived at the correct conclusion on the matter.

Applying the above threshold to the rival positions in this appeal on this issue, it is our finding that the process the appellant employed to summarily dismiss the 1st respondent from employment with them fell short of the above threshold for the reason that the appellant having sent the 1st respondent on compulsory leave to pave way for investigation into alleged financial malpractices and poor leadership in the discharge of his official function as the appellant's M.D, fair play and justice demanded that the 1st respondent should also have been interrogated by the investigative authority executing that mandate to accord him an opportunity to account for his actions. Likewise, at the conclusion of that investigation exercise he should have been furnished with the investigation report for him to respond where appropriate. Secondly, the prerequisites highlighted above, obligated the appellant upon making an informed decision to initiate disciplinary proceedings against the 1st respondent to frame charges in clear and unequivocal terms and put these to him to respond to even before appearing before the HR&GP on 28th January, 2010, a procedure appellant's own witnesses admitted had not been taken as **Jakaiti** (RW2), conceded that although he had knowledge that the matter was reported to the CID for investigation, he had no knowledge of what became of those investigations. He also conceded that no formal charges were framed and served on the 1st respondent before he appeared before the HR&GP committee on 28th January, 2010. It therefore, follows that, the 1st respondent's assertion that he would have given better explanations to matters raised for him to respond to in the HR&GP committee proceedings had he been furnished with those allegations beforehand was not only plausible, but was also well founded on the facts on the record.

It is also on record that the HR&GP Committee compiled a report arising from the disciplinary proceedings held against the 1st respondent on 28th January, 2010. This is the report that went before the Board and on the basis of which the Board issued a show cause letter to the 1st respondent to which he responded to in writing. The contents of this report were not also given to the 1st respondent before he gave his response to the letter served on him to show cause. There is therefore some justification for the assertion that the 1st respondent was greatly prejudiced in his response to the show cause letter for lack of sufficient information on the allegations leveled against him. The appellant cited no Rule or Regulation that entitled them to withhold the report from the 1st respondent. It is also undisputed that nowhere in the said show cause letter was the 1st respondent given an option to either appear in person or adopt his written responses as his defence. It therefore follows that the 1st respondent's contention that he would have liked to appear in person and defend himself before the Board and was therefore greatly prejudiced by the appellant's failure to accord him that opportunity is also well founded.

It is also undisputed that the report of the HR&GP Committee meeting held on 28th January, 2014, and which the 1st respondent had been summoned to appear and respond to allegations, of financial mismanagement and poor leadership in the discharge of his functions as the appellant's M.D, was not properly authenticated as categorically admitted on oath by both **Jakaiti** (RW2) and **Dr. Florence Mukonyo Musau** (RW3). Lack of proper authentication of this report rendered not only its contents invalid but also tainted. Any action undertaken both by the HR&GP committee and the Board and subsequently the Minister in furtherance of all that was intended to be achieved by those contents stood vitiated and therefore of no consequence. So too the deliberations of the Board leading to the summary dismissal.

It therefore follows that the 1st respondent's summary dismissal which was anchored on the contents of that report was null and void and of no consequence. The trial court rightly vitiated it.

In light of the above assessment and reasoning, the trial court cannot be faulted for declaring the summary dismissal of the 1st respondent from his employment as unfair and unlawful.

We now examine the legality of the three reliefs granted to the 1st respondent by the trial court, which the appellant challenges, namely, the award for the unexpired term of the contract; compensation for non-service of the notice for summary dismissal; and payment in lieu of notice. Payment of salary compensation for the unexpired period of the contract is disallowed for the reasons given above. In lieu thereof, we substitute therefor payment of three months' salary in lieu of notice in terms of **clause 26** of the contract being salary of Kshs. 300,000 +

House allowances of Kshs. 80,000.00 total Kshs. 380,000x3=1,140,000.00 which we substitute in the place of the amount allowed by the trial court of Kshs 1,380,000.00. Value of notice pay for summary dismissal is disallowed as the same was not provided for in the contract nor the Act.

In the result, the appeal succeeds only with regard to the above 3 items. The rest of the reliefs granted and in respect of which no complaint was raised by the appellant are affirmed as granted by the trial court. For avoidance of doubt, the final orders on appeal are as follows:

- (1) Compensation for the unexpired period of the contract together with all attendant benefits is disallowed for the reasons given.
- (2) Notice pay as compensation for non-service of notice for summary dismissal is disallowed for the reasons given.
- (3) The value of notice allowed at Kshs. 300,000.00 salary +Kshs. 80,000.00 house allowance total =Kshs. 380,000.00 x 3 months = 1,140,000.00. The award of Kshs. 1,380,000.00 is hereby set aside.
- (4) Reliefs granted by the trial court and not contested on appeal which are affirmed are as follows:
 - (i) Withheld allowances from December, 2009 until April, 2010 being commuter allowances of Kshs. 20,000.00 x5 months = Kshs. 100,000.00.
 - (ii) Consolidated allowance of Kshs. 60,000.00 x5 months = Kshs. 300,000.00.
 - (iii) Leave pay- one month's salary in lieu of leave in the sum of Kshs. Kshs. 460,000.00
 - (iv) Gratuity at 31% of the basic salary for the one year served of Kshs. 1,116,000.00
- (5) The sums awarded will carry interest at court rates from the date of filing of the claim that is 23rd May, 2012.
- (6) The appellant shall have ¼ of the costs of the appeal.

Dated and Delivered at Nairobi this 11th day of October, 2019.

P.N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.