IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MAKHANDIA & OTIENO-ODEK, JJA)

CIVIL APPEAL No. 346 of 2014

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION.....APPELLANT

AND

NICHOLAS MWENDA MTWARUCHIU.....1st RESPONDENT

PETER MURITHI MOFFAT.....2nd RESPONDENT

KIMWELE MUNEENI.....3rd RESPONDENT

ENOCH KIMANZI NGUTHU.....4th RESPONDENT

SAMUEL T. WANJERE.....5th RESPONDENT

FRANCIS NJERU MWANIKI.....6th RESPONDENT

JOHNSTONE K. CHEPKWONY.....7th RESPONDENT

FREDRICK G. CHABARI.....8th RESPONDENT

ATTORNEY GENERAL.....9th RESPONDENT

(Being an Appeal from the Judgment and Decree of the Employment and Labour

Relations Court at Nairobi (Hon. Lady Justice L. Ndolo) dated 15th September 2014

and delivered on 16th September 2014 by Hon. Justice Mathews Nduma Nderi

in

Petition No. 36 of 2013)

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JUDGMENT OF THE COURT

1. The Appellant is a statutory body known as the **Ethics and Anti- Corruption Commission(EACC)** established pursuant to the Ethics and Anti-Corruption Act, 2011. The Appellant is successor in law to the Kenya Anti-Corruption Commission (KACC).

2. By a Petition dated 24th October 2013, the 1st to 8th Respondents jointly and severally sought *inter alia* an order compelling the Appellant to unconditionally reinstate them to their employment without loss of status, salary (including back pay), position and benefits. The Respondents further sought a declaratory order that their employment services were unprocedurally and unfairly terminated; that they are

entitled to the benefits and special damages enumerated in the Petition; they further sought a declaration that the Appellant illegally purported to vet and subsequently terminate the employment services of the 4th and 6th Respondents who were on contract with the Public Service Commission; the Respondentsfurther sought a permanent injunction restraining the Appellant by itself or its agents, servants, employees or whomsoever so acting on its behalf from terminating the Respondents from its employment on the basis of a flawed vetting exercise.

3. In their Petition, the Respondents individually claimed special damages compensation for the following item heads:

(i) 12 months' salary for unfair termination.

(ii) Unpaid salary for the lower of the retirement age of 60 years and 24years of service. (sic)

(iii) Unpaid leave allowance until retirement.

(iv) Unpaid medical cover until retirement.

(v) Unpaid salary for days worked.

(vi) Underpaid leave days.

(vii) Unpaid salary in lieu of notice.

(viii) Unpaid employer's contribution to NSSF until retirement.

4. In this appeal, there is contention whether the 4th Respondent ***(Enoch Kimanzi Nguthu)*** and the 6thRespondent ***(Francis Njeru Mwaniki)*** were employees of the Appellant. To appreciate the genesis and contextual basis of the contention, it is important to elucidatethe background employment facts as perceived by each party.

BACKGROUND FACTS

5. The 1st to 8th Respondents in the Petition filed before the trial court aver that they were initially employed by the Appellant on diverse dates between 23rd December 2004 and 26th April 2011 in various positions. That on diverse dates between 28th March 2013 and 30th April 2013, the Appellant wrote to the Respondentsinforming them that their employment services had been terminated.

6. The gist of the Respondents claim is that the Appellant's termination of their contract of employment in March and April 2013 was unprocedural, high handed, illegal, arbitrary and amounted to unfair, illegal and unlawful dismissal.

7. From the perspective of the Appellant, the Respondents were not *per se* and in law employees of the Appellant; they were initially employees of the Kenya Anti-Corruption Commission (KACC). It is the Appellant's contention that the Respondents were not dismissed from employment but their services were terminated automatically by operation of a statutory instrument. To the Appellant, there is no question of unprocedural, unfair, illegal or unlawful dismissal. The Respondents employment services were terminated by operation of law. The Appellant cited dicta from the South African Labour Court case of **Nongacansti -v- Mnquma Local Municipality & others (PA07/15 [2016] ZALAC 54** where it was stated:

> **"…. There was no dismissal – since the automatic termination was not caused by any decision or act of the municipality of SAPS, which had as its objective the termination of the appellant?s employment contract…Significantly, the appellant freely and voluntarily agreed to a vetting and to an automatic termination, if the vetting yielded a negative result. This was material to the appellant?s suitability for the position he was employed in…."**

8. In support of the competing contestations, the salient facts and applicable law in this suit are:

(a) The Appellant, the Ethics and Anti-Corruption Commission (EACC) is established by the Ethics and Anti-Corruption Commission Act, 2011. EACC was established after the Respondents had been employed by the Kenya Anti-Corruption Commission (KACC). In effect, some of the Respondents were initially employees of KACC not EACC.

(b) Pursuant to Section 32 (a) (b) (c) and Part V Section 34 (3) (a) (b) (c) and (4) of the EACC Act, 2011, the law stipulated and required all officers formerly working with the defunct KACC who wished to work for EACC and all new employees of EACC to be vetted to ascertain their suitability and compliance with Chapter Six of the Constitution on Leadership and Integrity. Section 34 (3) (b) in particular required the Commission to develop a vetting criteria.

(c) The Appellant's contention is that the Respondents failed the vetting exercise and by virtue of Section 32 and 34 of the EACC Act, their contract of employment was not transited from KACC to EACC and thus, by operation of law, their employment services was effectively terminated through the vetting process.

9. The Respondents do not contest that the EACC Act required them to undergo a vetting process. Their contention is that the vetting exercise was null and void and thus, their contract of employment could not be terminated by operation of law.

10. The Respondents contend that the vetting exercise was null and void because first, it was conducted by a vetting panel not properly constituted and second, there was no properly constituted Ethics and Anti-Corruption Commission that could authorize the vetting process and make decisions thereon. In support of this contention, the Respondents state that at the time of the vetting exercise, there were only Two (2) EACC Commissioners in office while the quorum for the Commission to operate is a minimum of Three (3) Commissioners; that there were no three Commissioners in office at the time the vetting exercise took place and the time the decision to terminate their employment services was made.

11. Conversely, the Appellant contends that the Commission was properly constituted as there were Three Commissioners in office at the time the vetting exercise took place and at the time the Commission made the decision to terminate the employment services of the Respondents.

12. The law and facts giving rise to the legal contestation as to whether the EACC was properly constituted is as follows:

(a) Under *Article 250 (1) of the Constitution, each Commission shall consist of at least three, but not more than nine Commissioners.*

(b) Section 4 of the EACC Act No. 22 of 2011 stipulates that the Commission shall consist of a Chairperson and two other members.

(c) On 11th May 2012, the President of the Republic of Kenya appointed Mr. Mumo Matemu as the Chairperson of EACC. Two other Commissioners namely Ms Jane Onsongo and Ms Irene Keino were appointed members of the Commission.

(d) The High Court, in a judgment dated 20th September 2012 in ***Petition No. 229 of 2012 between Trusted Society of Human Rights -v- Attorney General & others****, nullified the appointment of Mr. Mumo Matemu as Chairperson of the Commission.*

(e) The High Court's decision was appealed and the Court of Appeal in a judgment dated 26th July 2013 in ***Mumo Matemu –v- Trusted Society of Human Rights Alliance & 5 others [2013] eKLR (Civil Appeal No. 290 of 2012) s****et aside and vacated the whole decision of the High Court with the legal consequence that Mr. Mumo Matemu took office as Chairperson of the EACC.*

(f) Between 20th September 2012 and 26th July 2013, Mr. Mumo Matemu had not assumed office as Chairperson of EACC due to the ongoing litigation on his suitability to hold office.

(g) It is the Respondents contention that at the time of the purported vetting exercise and termination of their employment on 28th March 2013 and 30th April 2013, the EACC had only Two (2) Commissioners in office and no substantive Chairperson. That due to this fact, the EACC was not properly constituted to make the decision to terminate their employment contracts.

(h) Section 9 of the second Schedule to the EACC Act No. 2 of 2011 stipulates that all instruments made by and decisions of the Commission shall be signified under the hand of the Chairperson and the Secretary. It is the Respondents contention that at the time of termination of their employment there was no substantive Chairman.

(i) That Article 74 of the Constitution stipulates that before a State Officer assumes office, the person must take and subscribe to the Oath of Office. That at the time of the vetting exercise, the Chairman of the EACC, Mr. Mumo Matemu, had not taken Oath of Office and thus the Commission was not complete.

(j) That since the Commission was not properly constituted, the Committee or individuals who purported to terminate the Respondents employment contracts were not competent to make such a decision or any at all.

(k) That the purported Secretary/Chief Executive Officer of the Commission was in office illegally as he was appointed by a non-existent Commission.

TRIAL COURT?S DETERMINATION

13. The trial court in a judgment delivered on 16th September 2014 considered the Petition and claims made by the Respondents. The Court noted that the Respondents in their Petition sought various orders and declarations.

14. In the Petition, the Respondents aver that the Appellant in terminating their employment contracts violated ***Articles, 27, 28, 29 (f), 31 (c)***and ***(d), 35, 41,43 (2) (e)*** and ***47*** of the Constitution. That the Appellant violated their constitutional right to equality and freedom from discrimination; right to dignity; right to privacy, right to information and their right to social security by exposing them to joblessness. It is contended that in all, the Appellant's conduct was an unfair labour practice and a violation of their right to fair administrative practices.

15. Upon considering the pleadings filed, the trial court identified *inter alia* the following as key issues for determination:

(i) Whether the trial court had jurisdiction to hear and determine the suit.

(ii) Whether the constitutionality of the Commission and the legality of the secondment of employees of the Public Service Commission to the EACC was res judicata.

(iii) Whether Section 34 (2) and (3) of the Ethics and Anti-Corruption Act was unconstitutional.

(iv) Whether the vetting of the Respondents was lawful.

(v) Whether the termination of the Respondents employment was substantively and procedurally fair.

(vi) Whether the Respondents were entitled to the reliefs sought.

16. At paragraph 25 of its judgment, the trial court held that it had jurisdiction to hear and determine the suit.

17. On the issue whether the matters raised in this suit were *res judicata* having been determined in the case of **Ruth Muganda -v- KACC & DPP Nairobi HC Misc. App. No. 288 of 2012** and in **Africa Centre for International Youth Exchange (ACIYE) & others -v- EACC, Nairobi HC Petition No. 334 of 2012);** the trial court held that the issues canvassed in the instant case were not *res judicata*. That the specific issues in the instant case has to do with the legality of the vetting of the Respondents and the subsequent termination of their employment. That these specific issues were not canvassed in the cited cases and moreover, the Respondents were not party to the cases cited.

18. At the core of the entire suit between the Appellant and the Respondents is ***Section* 34 (2) and (3)** of the Ethics and Anti-Corruption Act. The Sections provides as follows:

"Transfer of staff of the Kenya Anti-Corruption Commission

34 (1) Subject to subsection (4), a person who immediately before the commencement of this Act was serving on contract as a member of staff of the Kenya Anti-Corruption Commission, other than the Director and Deputy Directors, shall, at the commencement of this Act, be deemed to be an employee of the Commission for the unexpired period, if any, of the term.

(2) Every person who immediately before the commencement of this Act was an employee of the Government attached to the Kenya Anti-Corruption Commission shall, upon the commencement of this Act, be deemed to be an employee of the Commission for the unexpired period, if any, of the term of the contract.

(3) Notwithstanding subsections (1) and (2), and before appointing or employing any member of staff of the Kenya Anti-Corruption Commission who wishes to work for the Commission, the Commission shall—

(a) require such a person to make an application for employment or appointment to the Commission; and

(b) using the criteria determined by the Commission, vet such a person to ensure that he or she is fit and proper to serve in the position applied for as a member of staff of a Commission.

(4) An applicant who fails to meet the vetting criteria under subsection (3) shall not be employed or appointed by the Commission and the services of such applicant with the Commission shall be terminated in accordance with the terms of the contract of employment."

19. On the Respondents contention that Section 34 of the EACC Act was unconstitutional, the trial court at paragraph 41 of the judgment held that the Section was not unconstitutional.

20. On the merits of the Petition, the trial court observed that the Respondents' case was premised on the contention that the vetting process established by the Appellant was illegal, null and void. The Respondents contended that the vetting was irregular because the Commission was not properly constituted.

21. The Appellant in response to the contestation that the Commission was not properly constituted submitted that ***Article 259 (3) (b)*** of the Constitution recognizes persons holding office in an acting capacity; that with regard to the Commissioners, the Constitution did not contemplate vacancy in the membership of any Constitutional Commission; citing ***Section 53*** of the **Interpretation and General Provisions Act**, the Appellant submitted that the powers of a Board, Commission, Committee or a similar body shall not be affected by a vacancy in membership or defect in appointment of a member. Reference was also made to ***Sections 5*** and ***8*** of the Second Schedule of the EACC Act which provides for quorum and validity of proceedings of the Commission.

Article 250(1) of the Constitution provides:-

"Each Commission shall consist of at least three, but not more than nine, members."

22. The trial court made a specific finding that the vetting process conducted by the Appellant was a nullity. In making this finding, the Court at paragraphs 46 and 47 of the judgment expressed itself as follows:

"However, whichever way I read, I find no other meaning of Article 250 (1) of the Constitution other than that for a Commission to be properly constituted, it must have at least three members. At the time the 1st Respondent undertook the vetting exercise upon which the Petitioners employment was terminated, it had only two members and the fact that the 1st Interested Party donned two hats: that of Acting Chairperson and Vice Chairperson cannot cure this fundamental flaw.

The effect of my finding in this regard is that the vetting undertaken by the 1st Respondent that led to the termination of the

Petitioner?s employment was a nullity. It follows therefore that any decision arising therefrom, including the termination of the Petitioners employment were also a nullity.

23. As to whether the Respondents were entitled to any reliefs, the trial court held as follows at paragraph 55 of the Judgment:

> **"However, having declared the vetting process and the consequent decisions including termination of the Petitioners employment a nullity, I direct that the Petitioners be paid their full salary and allowances for the period they would have served under their last contracts with the 1st Respondent. The 1st Respondent shall compute and pay the specific sums to the Petitioners within the next thirty days from the date hereof. The 1st Respondent is further directed to issue the Petitioners with Certificate of Service."**

24. Aggrieved by the determination of the trial court, the Appellant lodged an appeal against the entire judgment of the trial court. The Respondents on their part lodged a cross-appeal. Both parties urged that the judgment of the trial court be set aside, quashed and/or varied.

25. The Appellant's Memorandum of Appeal *in extenso* urges the following grounds:

> *(1) That the learned judge erred in law and fact in holding that the vetting process that was undertaken by the Appellant was a nullity.*
>
> *(2) The learned judge erred in law in upholding the Respondents claims of unlawful termination of their contracts of employment when their claims were based on contracts executed with the Appellant at a time when the said judge had found the appellant not to have been properly constituted in law.*
>
> *(3)The learned judge erred in law in failing to uphold the Appellant'ssubmission that unsuccessful applicants in anappointment/reappointment process carried out by a public body such as the Appellant are not entitled in law to apply for judicial review of the offending decision as there is no legal right to be appointed to a public office.*
>
> *(4) The learned judge erred in law in failing to hold that a contract of employment can be terminated at any time by any party thereto subject to the terms of the contract.*
>
> *(5) The learned judge erred in law in failing to hold that the Appellant was not legally obliged to employ the former employees of the defunct Kenya Anti-Corruption Commission.*
>
> *(6) The learned judge erred in law and fact in failing to hold that the vetting that was carried out by the Appellant was done in accordance with the law and more particularly the provisions of Sections 34 (3) and (4) of the EACC Act.*
>
> *(7) The judge erred in law and fact in failing to hold that the 1st to 8th Respondents contracts of employment were terminated in accordance with the terms of their contracts of employment.*
>
> *(8) The learned judge erred in law and fact in failing to hold that the 7th Respondent had at the relevant time served out his entire contractual term and that a contract of employment which has lapsed is not available for termination by either party and no claim can arise therefrom.*
>
> *(9) The learned judge erred in law and fact in failing to appreciate that there was no material placed before the Court to warrant the making of the finding that the vetting that was carried out by the Appellant was procedurally unfair.*
>
> *(10) The learned judge erred in law and fact in failing to appreciate and uphold the Appellant's submission that vetting that is carried out as part of an appointment/re-appointment is not a disciplinary process that is subject to the provisions of Section 41 of the Employment Act, 2007.*
>
> *(11) The judge erred in law and fact in failing to hold that the requirement of procedural fairness is flexible and entirely dependent on context.*
>
> *(12) The learned judge erred in law and fact in failing to consider the evidence adduced by the Appellant of public and employee participation in the formulation of the Vetting Policy, Guidelines and Procedures developed pursuant to Section 34 (3) (b) of the EACC Act.*
>
> *(13) The learned judge erred in failing to consider and analyze any of the authorities relied upon by the Appellant in support of its case and to give reasons why the Court found the said authorities to be inapplicable to the Petition.*
>
> *(14) The learned judge erred in law in awarding the Respondents damages for the unserved terms of their respective contracts, a remedy that was not available to them in law.*
>
> *(15) The judge erred in law in failing to compute the specific sums that are payable to each one of the Respondents pursuant to the judgment of the Court and in directing the Appellant to compute the sums payable.*

26. The Respondents Cross-Appeal raises*inter alia* the following abridged grounds:

(a) That the trial judge failed to appreciate, address, deliberate and consider all issues raised by the Respondents in their pleadings and submissions.

(b) That the judge erred in law in finding that Sections 34 (2) and (3) of the EACC Act were not in contravention of Section 31 (1) and (2) of the Sixth Schedule of Constitution as read with Article 2 of the Constitution.

(c) The judge erred in law and fact in failing to calculate and award the Respondents statutory benefits such as payment for unfair termination, payments in lieu of leave, unpaid salary in lieu of notice and other outstanding payments.

(d) The judge erred in law and fact by directing the Appellant to calculate what was due to the Respondents.

(e) The judge erred in law by computing the award based on misapprehended facts and incorrect and inapplicable provisions of law.

(f) The judge erred in law and fact in failing to award damages for violations of the fundamental rights and freedoms of the Respondent Petitioners.

(g) The judge erred by disregarding the constitutional provisions safeguarding the Respondents constitutional rights.

(h) The judge erred by refusing to award the Respondent Petitioners costs of the Petition.

27. In the Cross-Appeal, the Respondents pray for a declaration that their contracts of employment were never properly terminated and they be allowed to proceed back to work with back pay to date. They pray that the judgement of the trial court be set aside. In the alternative, they pray that they be paid their dues as pleaded and proved in the petition.

28. At the hearing of this appeal, learned counsel Mr. Edwin Waudo appeared for the Appellant while learned counsel Mr. Enonda Dickson appeared for the 1st to 8th Respondents. The Appellant and Respondents filed written submissions and filed list of authorities. The Attorney General as the 9th Respondent, despite being served with a hearing notice, did not appear and neither filed written submissions nor list of authorities. This Court being satisfied that all parties were served with the hearing notice proceeded to hear the appeal.

29. The Appellant in its oral and written submissions urged us to allow the appeal. It was submitted that the Respondents were members of staff of the defunct Kenya Anti-Corruption Commission (KACC) and were serving in various capacities on contractual terms. That by virtue of operation of ***Section 34 (1)*** and ***(2)*** of the EACC Act, all former employees of KACC (except the Director and Deputy Directors) were transited to EACC subject to a vetting process. That it is through the statute-mandated process of vetting that the Respondents had their contracts of employment terminated on various dates between 28th March 2013 and 30th April 2013. That their contracts were terminated within a setting of the transition from the old to the new Constitution.

30. On the pivotal question whether the Appellant was properly constituted at the time of vetting and termination of the Respondents contracts of employment, it was submitted that the Appellant was duly constituted taking into account the following factors: first, all three Commissioners were duly appointing and two having assumed office, the requisite quorum to transact business of the Appellant generally and specifically in regard to the subject matter of vetting was achieved. Second, the Appellant in law is constituted as a body corporate with perpetual succession.

31. In further support of its submissions, the appellant stated that the High Court delivered its judgment setting aside the appointment of Mr. Mumo Matemu as Chairperson of the Commission on 20th September 2012 and the Court of Appeal set aside the High Court judgment on 26th July 2013. That it was during the pendency of both the High Court and Court of Appeal litigations that the Appellant proceeded to conduct the vetting process and terminated the Respondents contracts. That the question to be answered is whether pending the decision in the petition before the High Court and Court of Appeal, the Appellant had capacity to conduct the vetting or any other business. Put differently, the legal question is whether litigation on Mr. Mumo Matemu's appointment rendered every business conducted by the Appellant a nullity by reason that it was improperly constituted.

32. The appellant submitted that there was a full complement of three members of the Commission who were duly appointed in accordance with the provisions of the Constitution and the EACC Act; that there was no vacancy in the membership of the Commission within the meaning of ***Section 9*** of the EACC Act that could be filled as contemplated under Section 10 of the said EACC Act. That when the Court of Appeal set aside the High Court judgment, the effective date of appointment of Mr. Mumo Matemu was from the date of appointment vide **Kenya Gazette No. 6602** dated 11th May 2012.

33. The Appellant further submitted that ***Section 15*** of the EACC Act as read with the Second Schedule to the Act governs the procedure for conducting business and affairs of the Commission. That the quorum for conducting business is two thirds of all members of the Commission. That two thirds of the Commission are two members and at the time of vetting, there were two Commissioners and this constituted a valid quorum to conduct the business of the Commission including decisions on the vetting process and termination of contracts of employment. The Appellant further emphasized the corporate character of the Commission with perpetual succession.

34. On the issue whether the Respondents were employees of the Appellant, the Appellant states that **if** it did not have the capacity to terminate the Respondents contracts because they were purportedly employees of the Ministry of Justice, National Cohesion and Constitutional Affairs, then the Respondents' applications to the Appellant for employment did not give rise to any obligation on the part of the appellant to transit the Respondents to the new EACC.

35. Specifically, as regards the 7th Respondent (***Mr. Johnstone K. Chepkwony***), the Appellant submitted that he did not have a subsisting

contract with the Commission at the time of vetting, that he had served out his contract and therefore cannot have a valid claim for breach of contract.

36. On the remedy or relief that the Respondents are entitled to, the Appellant submitted that all Respondents were paid their terminal dues in accordance with the termination clauses in their respective contracts of employment. That under ***Section 49 (1)*** of the Employment Act, the remedy an employee is entitled to is the wages the employee would have earned had the employee been given the period of notice to which he was entitled under the Act or his contract of employment. Further, it was submitted that an employee is entitled to the equivalent of a number of months'wages or salary not exceeding twelve months. It is the Appellant's submission that the respondents are not entitled to damages since they were paid for the period of notice provided for in their contracts of employment in terms of ***Section 36*** of the **Employment Act**; that they were paid service gratuity and accrued leave.

37. The Respondents in their written submissions urged this Court to dismiss the appeal.It is stated that at the time of vetting, the Chairman of the Commission was yet to take the Oath of Office as envisaged under ***Article 74*** of the Constitution and thus the Commission was incomplete. That the vetting rules were not subjected to public participation and were null and void; that the vetting process was self-serving as there was no real chance of appeal or review as the same individuals sat in both Panels A and B; that there were no reasons given for the decision to terminate the 1st to 8th Respondents contracts of employment; that the Respondents were dismissed on untested accusations and were not allowed to face and test the veracity of the evidence of their accusers, if any existed; that the reasons for the decision reached by the vetting panel were not communicated to the Respondents; that the criteria for vetting was opaque; that the Respondents had a legitimate expectation that the Appellant would act in accordance with the provisions of the Employment act as read with the EACC Act.

38. On the issue whether the 7th Respondent had served out his contract of employment, the Respondents in their written submissions stated that the 7th Respondent had a legitimate expectation that his contract would be renewed as was previously done unless appropriate reasons were given or the Respondent had committed an employment offence to warrant non-renewal; that to take the 7 th Respondent through the vetting process and then turn around to say that his contract was not going to be renewed without giving reasons smacks of unfair labour practices of the highest order.

39. The Respondents in the Cross-Appeal urgedus to set aside the judgment of the trial court. It was submitted that the trial judge having found the termination to have been unprocedural and unfair, failed to appreciate and make awards to the Respondent for statutory benefits for unfair termination and payment in lieu of notice; that the court failed to make award for violations of fundamental rights and freedoms; the judge erred in not calculating what is due to the Respondents; the judge erred in directing the appellant to calculate the amount due to the Respondents; and the trial court erred in failing to award costs of the Petition to the Respondents.

40. The Respondents filed a list of authorities in support of their submissions. Of particular significance, the Respondents cited the decisions of this Court in **Michael Sistu Mwaura Kamau -v- Ethics & Anti-Corruption Commission & 4 others [2017] eKLR** and **Charity Kaluki Ngilu v. Ethics and Anti-Corruption Commission & 4 Others Civil Appeal No. 90 of 2016,** to support the submission that the Appellant, the Ethics and Anti-Corruption, Commission was not properly constituted. Also cited was the persuasive decision of **Okiya Omtatah Okoiti -v- Independent Electoral and Boundaries Commission & 2 others [2017] eKLR.**

41. In reply to the Appeal and Cross-Appeal, the Appellant reiterated its submissions and urged us to dismiss the Cross-Appeal. On the cases of **Michael Kamau** case (supra)and **Charity Ngilu** case (supra**)** cited by the Respondents, it was submitted that these cases were decided *per incuriam* on account of the Supreme Court decision in **Mable Muruli -v- Wycliffe Ambetsa Oparanya & 3 others [2016] eKLR.**

ANALYSIS AND DETERMINATION

42. We have evaluated the rival written submissions by learned counsel, examined the record of appeal and considered the authorities cited. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. It was put more appropriately in **Selle -vs- Associated Motor Boat Co. [1968] EA 123,** thus:

> **"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)."**

43. The central issue in this appeal is whether the Appellant, the Ethics and Anti-Corruption Commission was properly constituted at the time of vetting of the Respondents and at the time of making the decision to terminate the contract of employment of the Respondents.

44. We have *in extensor* replicated the grounds of appeal and cross-appeal in this judgment. It is apparent that both the Appellant and Respondents are aggrieved and dissatisfied with the judgment of the trial court. For different reasons, both parties have urged this Court to set aside the judgment. If the judgment could be set aside by consent, we would have had no hesitation to do so. However, it is imperative on our part to evaluate the evidence on record and apply the relevant law to determine if there is merit in the appeal and cross-appeal.

45. The first crucial issue that we need to determine is the claim of the 7th Respondent. The 7th Respondent is ***Johnstone K. Chepkwony***. The Appellant contends that the 7th Respondent has no valid contractual claim because his contract of service had lapsed by effluxion of time; that he has no valid subsisting contract upon which he can base any claim against the Appellant. Conversely, the Respondents urge that the 7th Respondent had a legitimate expectation that his contract of employment would have been renewed and that subjecting him to the vetting process and thereafter refusing to renew his contract is an unfair labour practice that entitles him to damages for unfair dismissal and

violation of his constitutional rights.

46. It is not disputed that the 7th Respondents contract of employment lapsed on 30th April 2013. It is also not disputed that his contract was terminated on 30th April 2013.

47. In the Affidavit by ***Halakhe Dida Waqo*** dated 16th December 2013 more particularly at paragraph 56 and 61, it is deposed that the Appellant did not terminate the contract of the 7th Respondent as alleged. That the 7thRespondent served out the full term of his contract. That he applied for renewal of his contract vide a letter dated the 25th February 2013. That the Commission notified him through a letter dated 5th April 2013 that his contract would not be renewed upon its expiry on 30th April 2013. That upon expiry of his contract, the 7th Respondent was paid service gratuity for the period served and his 28 leave days were commuted to cash.

48. In the case of **Chacha Mwita -v- KEMRI & Others, Cause No.1901 of 2013** it was held that;

> **"… fixed term employment contract is, for example, entered into for a period of six months with a contractual stipulation that the contract will automatically terminate on the expiry date, the fixed term employment contract will naturally terminate on such expiry date, and the termination thereof will not (necessarily) constitute a dismissal, as the termination thereof has not been occasioned by an act of the employer. In other words, the proximate cause of the termination of employment is not an act by the employer. There is a definite start and a definite end. Thus, the contract terminates automatically when the termination date arrives; otherwise, it is no longer a fixed term contract."**

The 7th Respondent's case is premised on the allegation that there was a legitimate expectation that his contract would be renewed.

49. In the persuasive decision of **Bernard Wanjohi Muriuki -v- Kirinyaga Water and Sanitation Company Limited & another [2012] eKLR,** Riika J, correctly held as follows: -

> ***"In the view of the Court, there is no obligation on the part of an employer to give reasons to an employee why a fixed-term contract of employment should not be renewed. To require an employer to give reasons why the contract should not be renewed, is the same thing as demanding from an employer to give reasons why, a potential employee should not be employed.***
>
> ***The only reason that should be given is that the term has come to an end, and no more. … Reasons, beyond effluxion of time, are not necessary in termination of fixed-term contracts, unless there is a clause in the contract, calling for additional justification for the termination."***

50. This position has also been restated in **Francis Chire Chachi -v- Amatsi Water Services Company Limited, [2012] eKLR** as follows:

> **"This court has recently stated that employers are not under any obligation to give employees reasons for non-renewal of fixed term contracts, unless there is such an obligation created in the expiring contract."**

51. In **Margaret A. Ochieng -v- National Water Conservation and Pipeline Corporation [2014] eKLR**, it was expressed that an employee on fixed term contract should not expect an automatic renewal. In **Pravin Bowry -v- Ethics& Anti-Corruption Commission [2013] eKLR (CAUSE NO. 1168 OF 2012)** the court while dealing with an instance of unfair termination of term of contract stated:

> **"...the court fully embraces the principle of legitimate expectation as espoused by the supreme court of Canada in Wells case and finds that the case is fully applicable in the case of the claimants .....the court notes that for the purposes of effecting this benefit, the only precondition is that there be premature termination of contract of employment."**

52. Comparatively, in the Namibian case of **John and Penny Group (Pty) Ltd - v- Gerhardus Gabriel & Others Case No: LCA 37/2016** it was held that an employee employed on a fixed term contract, and whose contract terminates by effluxion of time is not entitled to severance pay.

53. In the persuasive case of **Margaret, A Achieng -v- National Water Conservation & Pipeline Corporation [2014] eKLR,** it was held that the contract of employment had lapsed on 16th December 2011 and on 19th December 2011 the Respondent communicated its decision on non-renewal and therefore there was no legitimate expectation of renewal.

54. In the instant case, the Appellant was not obligated to renew the expired contract of the 7th Respondent. In **Bernard Wanjohi Muriuki -v- Kirinyaga Water & Sanitation Co. Limited & Another [2012] eKLR** it was held that"

> **"the expectation held by the claimants that the contracts would be renewed had no basis as there was no express, clear and unambiguous promise given by the Respondent for such an issue to arise. To hold such would be to deny the Respondent the right to make a decision on the matter of renewal of expired term contracts."**

55. In **Communication Commission of Kenya & 5 Others -v- Royal Media Services & 5 Others, SC Petition Nos. 14, 14 A, 14B & 14C of 2014,**the Supreme Court stated that:

> **"legitimate expectation arises when a body by representation or by past practice, hasaroused an expectation that is within its**

power to fulfill.

For an expectation to be legitimate, therefore, it must be founded upon a promise or practice by a public authority that is expected to fulfill the expectation."

56. Guided by the foregoing authorities, we are certain that a contract of employment lapses by effluxion of time. In this regard, the 7th Respondent had no legitimate expectation in law that his contract of employment would be renewed. Renewal of a contract of employment is based on mutual agreement. The record shows that the Appellant informed the 7th Respondent that his contract will not be renewed. There was no representation expressly or impliedly made to the 7th Respondent that his contract shall be renewed.

57. Noting that the 7th Respondent's contract was not renewed, we take the view that his contract ended on 30th April 2013 by effluxion of time and find that the 7th Respondent has no valid contractual or statutory claim against the Appellant. The testimony of Mr. Halakhe Dida Waqo that the 7th Respondent was paid in full all his dues under the expired contract was not challenged. Accordingly we find that the trial court erred in entering judgment in favour of the 7th Respondent when he was not entitled to any claim or judgment against the Appellant.Accordingly, the 7th Respondent is not entitled to any claim or payment from the Appellant.

58. We now turn to the crux of this appeal and the *ratio decidendi* of the judgment of trial court. The *ratio decidendi* of the trial court is expressed at paragraph 47 of the judgment as follows:

"However, whichever way I read, I find no other meaning of Article 250 (1) of the Constitution other than that for a Commission to be properly constituted, it must have at least three members. At the time the 1st Respondent undertook the vetting exercise upon which the Petitioners employment was terminated, it had only two members and the fact that the 1st Interested Party donned two hats: that of Acting Chairperson and Vice Chairperson cannot cure this fundamental flaw.

The effect of my finding in this regard is that the vetting undertaken by the 1st Respondent that led to the termination of the Petitioner?s employment was a nullity. It follows therefore that any decision arising therefrom, including the termination of the Petitioners employment were also a nullity."

59. The gravamen of the Appellant's appeal is that the trial court erred in finding that the EACC was not properly constituted at the time of vetting and at the time of making the decision to terminate the Respondents contract of employment. This specific issue has been considered and determined by this Court in **Michael Sistu Mwaura Kamau -v- Ethics & Anti-Corruption Commission & 4 others [2017] eKLR (Nairobi Civil Appeal No. 102 of 2016).** The Respondents response is that the case of **Michael Sistu Mwaura Kamau** case (supra) was decided *per incuriam* in ignorance of the Supreme Court decision in **Mable Muruli -v- Wycliffe Ambetsa Oparanya & 3 others [2016] eKLR.**

60. Both in **Michael Sistu Mwaura Kamau -v- Ethics & Anti-Corruption Commission & 4 others [2017] eKLR** and in **Charity Kaluki Ngilu -v-Ethics & Anti-Corruption Commission & 4 others [2017] eKLR**, this Court held that the Ethics and Anti-Corruption Commission, the Appellant herein, was not properly constituted when it had only Two (2) Commissioners in office. The same facts and submissions made by the Appellant in the instant appeal was made by the Appellant in **Michael Sistu Mwaura Kamau** case (supra) and in **Charity Kaluki Ngilu** case (supra). In these two cases, this Court did not uphold the self-same Appellant's submissions

61. At this point, it is important to revisit the holding and reasoning in these cases and thereafter determine if the decisions are *per incuriam.* In **Michael Sistu Mwaura Kamau (supra)**,this Court in relevant excerpts expressed as follows:

"Opposing the appeal, the 1st respondent contended that at all material times, the EACC was a body corporate with perpetual succession. It therefore had the ability to perform all its constitutional and statutory functions under Article 252 of the Constitution and section 11(1) of the EACC Act, the ACECA and the Leadership and Integrity Act. Those powers, it was urged, are vested in the EACC itself and may be exercised in the absence of Commissioners.

On the first issue in this appeal, we are unable to agree with EACC?s contention that the secretariat on its own can investigate and make recommendations to the DPP in the absence of commissioners. Firstly, section 2 of the EACC Act defines „Commission? to mean the EACC as established under section 3 of the EACC Act. Section 3 of the EACC Act then establishes the EACC whose composition is provided for under section 4. Under that section, the composition of the EACC shall consist of a chairperson and four other members appointed in accordance with the provisions of the Act. This provision is in line with Article 250 (1) of the Constitution, which provides that each of the constitutional commissions shall consist of at least three but not more than nine members. As regards the secretary, Article 250 (12) of the Constitution requires each commission to have a secretary who it appoints and is the chief executive officer. Similarly, section 16 of the EACC Act has mandated the EACC to appoint, with the approval of the National Assembly, a suitably qualified person to serve as its secretary. Under section 16 (7) of the Act, the secretary is the chief executive officer of the EACC, the accounting officer, and is responsible for carrying out the decisions of the EACC, the day-to-day administration and management of the affairs of the EACC, supervision of the employees and perform such other duties as may be assigned by the EACC.

Accordingly, we take the view that the secretary is an employee of the EACC. He or she is appointed by the commissioners and as correctly held by the High Court, is not on the same level as the commissioners. We are satisfied that the High Court was right when it stated that:

"to contend that the secretary, who is an appointee of the commission, is part of the commission would mean that the commission would, where the commissioners are nine, be composed of a membership of ten. One only need to mention

this to realize how ridiculous this argument is. We have no hesitation at all in holding that the secretary of the commission is not a member of the commission as contemplated under Article 250(1) of the Constitution".

Having found that the EACC was not properly constituted at the time it made a report and recommendations to the DPP to prosecute the appellant and having further found that indeed the DPP formed his decision to prosecute the appellant on the basis of the impugned report and recommendations, it is inevitable to conclude that the appellant?s prosecution was tainted with illegalities and that the High Court ought to have issued a declaration to that effect and prohibited his prosecution founded on the report and recommendations of the improperly constituted EACC.(emphasis supplied.)

This appeal succeeds on the technical ground that the EACC was not properly constituted at the time it completed the investigations and forwarded its report and recommendations to the DPP…"?(emphasis supplied.)

62. In **Charity Kaluki Ngilu** case **(supra)**, this Court referred to **Civil Appeal No. 102 of 2016** which is the case of **Michael Sistu Mwaura Kamau** case **(supra).** In referring to the decision,this Court expressed as follows:

"We do not intend to rehash in this judgment the parties? submissions simply because the EACC?s submissions in support of the cross-appeal and the grounds for affirming the decision of the High Court were the same submissions that it made in Civil Appeal No. 102 of 2016 to oppose that appeal. As a matter of fact, the EACC filed only one set of submissions to oppose Civil Appeal No 102 of 2016 and to support the cross-appeal in this appeal. Similarly, the submissions made by the DPP, the Attorney General, the Inspector General of the National Police Service and the Chief Magistrate?s Court, Milimani, to oppose Civil Appeal No 102 of 2016 were the same submissions that they relied upon to support the appellant?s cross-appeal and the grounds for affirming the decision of the High Court. Accordingly, all the issues raised in the cross-appeal and the grounds for affirming the decision of the High Court have been fully addressed in Civil No 102 of 2016.

We have also allowed Civil Appeal No. 102 of 2016, set aside the orders of the High Court dated 9th March 2016 dismissing the petition, and substituted therefor an order allowing the petition. In these circumstances, we have no choice but to dismiss the cross-appeal in this appeal."

63. Having highlighted the decision in **Michael Sistu Mwaura Kamau -v-Ethics & Anti-Corruption Commission & 4 others [2017] eKLR,** it is now opportune to determine if the decision was made *per incuriam.* The Respondents contend that the decision is *per incuriam*. The basis for this is that in **Michael Sistu Mwaura Kamau?s case (supra),** this Court held that the Commission is properly constituted when the Commissioners are in office and that the Secretary to the Commission are not part of the Commission. It is contended that in **Mable Muruli -v- Wycliffe AmbetsaOparanya& 3 others [2016] eKLR**, the Supreme Court held that the Commission comprises the Commissioners, as well as its employees who have been duly authorized.The Supreme Court expressed that had it been the case that all such tasks devolved only to "Commissioners", the consequence would be that all actions routinely taken by the Commission staff would be a nullity in law.

That there is need to avoid such construction of the Constitution as would be contrary to the public interest.

64. For clarity and *in extenso*, in **Mable Muruli -v- Wycliffe Ambetsa Oparanya & 3 others [2016] eKLR**, the Supreme Court in its ruling dated 21st April 2016 expressed itself as follows:

"[56] From the foregoing details regarding IEBC?s operations, it is clear to us that the appellant?s perception of its identity is inappositely limited. We take judicial notice that it would be impractical to expect the Commissioners *qua* "Commissioners", to conduct all the functions entrusted to the Commission under Article 88 (4) of the Constitution. The secretary, hence, can hardly do without employees entrusted with specified duties. Had it been the case that all such tasks devolved only to "Commissioners", the consequence would be that all actions routinely taken by the IEBC staff, such as continuous registration of voters, regular revision of voters? roll, and registration of candidates, would be a nullity in law. There is need to avoid such construction of the Constitution as would be contrary to the public interest. The requisite approach in interpreting Article 88 (1) of the Constitution, is one that vindicates the constitutional purposes and objectives, and that fosters good governance, in accordance with the terms of article 259. Good governance in this instance entails ensuring that the constitutional functions of the Commission do not come to a standstill, as is destined to happen if the discharge of such functions were left entirely to the nine Commissioners.

[57] In short, as we perceive it, the IEBC comprises the Commissioners, as well as its employees who have been duly authorized. Consequently, and in accordance with the *Joho* precedent, the Returning Officer, an employee of the IEBC, properly acts on its behalf."(emphasis supplied)

65. Following the foregoing Supreme Court dicta, the High Court in **Okiya Omtatah Okoiti -v- Independent Electoral and Boundaries Commission & 2 others [2017] eKLR**, expressed itself as follows:

393. This court does not subscribe to the notion that where there is a vacancy in the Commission as was in this case, then the Commission goes into comatose and unable to function completely because Commissioners are absent. I further do not buy the interpretation propounded by the petitioner and the 2nd interested party that the Commissioners are the Commission and vice versa. If that were the case, the Constitution would have stated so. Instead, the Constitution at Article 250(1) is clear that the Commission "consists of."

394. In other words, there is the Commission and the Commissioners are members of the Commission. The court has examined all the cases cited by the petitioner and the 2nd interested party on this issue and it is clear to my mind that the learned judges who determined similar issues in the Michael Sistu case were entitled to their line of thought.In that case,

High CourtPetition No. 230 of 2015: Michael Sistu Mwaura Kamau & 12 others v Ethics and Anti-Corruption Commission & 4 others [2016] eKLR and Misc. Application No. 637 of 2016; Republic v Independent Electoral and BoundariesCommission & another Ex Parte Coalition forReform and Democracy & 2 others [2017] eKLR; whereas the court was emphatic that the absence of Commissioners renders the Commission comatose, nonetheless, the Michael Mwaura Kamau case (supra) despite its findings, underscores an authoritative characteristic, that a decision made in the absence of the Commissioners may be valid and in accordance with the law if ratified by the Commission. The Court thus went on and stated:

> ***"356. Whereas we appreciate that the staff may, based on their areas of specialization, perform the duties for which they are appointed, to contend that they have a free hand to make binding recommendations arising from their duties without reference to the Commission, in our view would be absurd. The outcome of the tasks undertaken by the Commission's staff must be ratified by the Commissioners if they are to be deemed as the decisions of the Commission…"***

395. In JR 456/2015 Koech Kemboi -v- HalakheWakqo and 2 others [2015] eKLR Hon Onguto J was clear that the Act does not permit the CEO to hire employees of the Commission in the absence of the Commissioners. Again, that case cannot be equated to the IEBC which in my view occupies a special place in the democratic governance of this nation.

396. In the Republic -v- Independent Electoral and Boundaries Commission & another Ex Parte Coalition for Reform and Democracy & 2 others (supra) case, the court was dealing with a situation where Commissioners whose term had come to an end and their positions declared vacant albeit they were warming seats for the incoming Commissioners as per the MOU entered into between them and the legislature and as they negotiated their exit package with the treasury, whether they could sign any legally binding contract on behalf of the Commission. I agree with the learned Justice Odunga that in such scenario, the Commissioners who had resigned and whose positions had already been advertised were strangers to the Commission. They were neither Commissioners nor employees of the Commission hence they had no legal authority to perform any functions on behalf of the Commission. Accordingly, the facts of that case are at variance with the facts of this case.

397. From the above pronouncement by Odunga J, it is apparent that the court was conscious of the fact that there are situations when the Commission may not have Commissioners and certain decisions have to be taken out of necessity by the Secretariat. Therefore, it cannot be said that the court in the Michael Kamau Sistu **case laid down the law to be followed by this court to the effect that Commissioners are synonymous with the Commission and that without the Commissioners, the Commission is dysfunctional and or that any actions taken by the secretariat in the implementation of the mandate of the Commission is null and void.**

398. The position that this court so firmly holds onto is respectively fortified by the decision of the Supreme Court **in the case of Petition No. 11 of 2014: Mable Muruli –v-Wycliffe Ambetsa Oparanya & 3 Others [2016] eKLR where the Supreme Court which is the apex court of the land held that constitutional purposes and objectives of the Commission would still go on even in the absence of the Commissioners.**

66. Having examined the *ratio decidendi* in the Court of Appeal case of **Michael Sistu Mwaura Kamau** case (supra**)** the Supreme Court dicta in **Mable Muruli** case (supra), it is now time to determine if the Court of Appeal decision is and was *per incuriam.*

67. The Supreme Court in its decision examined the aspect of "Commissioners"*qua* "Commissioners" and Staff of the Commission. In so doing, the Supreme Court emphasized the functional and operational aspects of the Commission vis-à-vis constitutional composition of the Commission. It is in the functional and operational aspect that the staff of the Commission are part of the Commission. The staff at a functional level are employees, agents or servants of the Commission and whatever they do in their official capacity is deemed to be acts of the Commission.

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.

73. Having held that the Appellant was not properly constituted at the time of vetting, what reliefs are available to the Respondents? We have already held that the 7th Respondent has no claim against the Appellant because his contract of employment had lapsed by effluxion of time. We now consider whether the 1st, 2nd, 3rd, 4th, 5th, 6th and 8th Respondents are entitled to any relief before this Court.

74. Having held that the vetting process that the Respondents underwent was a nullity, any remedy or relief to the Respondents must be founded and grounded on their contracts of employment.The Respondents cannot blow hot and cold, in one instance arguing that the Appellant was not properly constituted to undertake the vetting exercise and in another arguing that the Appellant could legally and properly enter into an employer-employee contract with them. You cannot have your cake and eat it.

75. In the Petition filed before the trial court, the Respondents aver that the contracts of employment of the 4th Respondent (***Enock Kimanzi Nguthu***) and 6th Respondent (***Francis Njeru Mwaniki***) were renewed on 11th September 2012 by the Ministry of Justice, National Cohesion and Constitutional Affairs and not the Appellant. The 4th and 6th Respondents cannot blow hot and cold. If in their pleading they disown and do not recognize the Appellant as their employer, it follows that in principle they cannot have any valid claim against the Appellant. A party is bound by his pleadings. Further, from 12th September 2012, there was no properly constituted Ethics and Anti-Corruption Commission that could ratify or employ the 4th and 6th Respondents. Of relevance to this contestation is ***Section 34 (2)*** of the EACC Act. The Section provides:

> **"Every person who immediately before the commencement of this Act was an employee of the Government attached to the Kenya Anti-Corruption Commission shall, upon the commencement of this Act, be deemed to be an employee of the Commission for the unexpired period, if any, of the term of the contract.**

Based on ***Section 34 (2)*** we find that the 2nd, 4th and 6th Respondents were employees of the Appellant.

76. For the 2nd Respondent, (***Peter Murithi Moffat***), the record shows that his contract of employment was extended by the Commission with effect from 1st January 2013. The 2nd Respondent cannot blow hot and cold. As of 1st January 2013, the Commission was not properly constituted and it had no capacity to extend his contract.

77. Pertaining to the claim by 1stto 8th Respondents, in the Cross-Appeal, the Respondents prayed for orders of reinstatement. In **Kenya Airways Limited - v- Aviation & Allied Workers Unions Kenya & 3 others, (2014) eKLR,** Githinji, JA observed that the remedy of reinstatement is discretionary. However, a court is required to be guided by factors stipulated in ***section 49(4)*** of the Employment Act which includes the practicability of reinstatement or re-engagement and the common law principle thatspecific performance in a contract of employment should not be ordered except in very exceptional circumstances. The court should also balance the interest of the employees with the interest of the employer. Maraga, JA (as he then was) observed that one of the factors to be considered in determining whether or not to order reinstatement is practicability. Citing the case of **New Zealand Educational Institute -v- Board of Trustees of Auckland Normal Intermediate School [1994] 2 ERNZ 414 (CA),** the learned judge observed that "practicability is capability of being carried out in action, feasibility or the potential for the re-imposition of the employment relationship to be done orcarried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence."(See also **Communication Workers Union of Kenya -v- Telkom (K) Limited & 2 others (2006) eKLR).**

78. Guided and persuaded by the dicta in ***Kenya Airways Limited*** case (supra), we are convinced that the prayer for reinstatement in the Cross-Appeal is impractical and we decline to grant the same.It is impractical because the duration of the contracts of employment for all the Respondents has lapsed. By effluxion of time, the Respondents have no contract which can be reinstated. It is impractical to reinstate a person to a contract which does not exist and a court cannot initiate and write an employment contract for parties.

79. On the premise that reinstatement is not a practical remedy in this case, what relief should the 1st, 2nd, 3rd, 4th, 5th, 6thand 8th Respondents get? The appropriate relief is compensatory relief for unprocedural termination of their contracts of employment. In **Paramount Bank Ltd - vs- Mohamed G. Qureishi & Another, (Civil Appeal No. 239 of 2001) (CA); [2005] eKLR**, it was stated that the traditional common law view has been that illegal termination of a contract of employment entitled the dismissed employee to damages and that the measure of damages is salary in lieu equivalent to period of the notice provided for in the service contract. (See also **Rift Valley Textiles Ltd -v- Edward Onyango Ogada Civil Appeal No.27 of 1992, Alfred Githinji -v- Mumias Sugar Company Ltd Civil Appeal No.194 of 2001** and **Central Bank of Kenya -v- Nkabu [2002] 1 E.A. 34**).

80. In the instant appeal, the record as per the Affidavit by ***Halakhe Dida Waqo*** dated 16th December 2013 at paragraphs 35 to 64, shows that all the Respondents were paid salary in lieu of notice in accordance with their respective contracts of employment. In addition, each Respondent was paid service gratuity for the period served and any accrued leave days was commuted to cash.

81. On our part, being satisfied that each of the 1st, 2nd, 3rd, 4th, 5th, 6th and 8th Respondents were paid salary in lieu of notice, gratuity and any accrued leave was commuted into cash, we find that the Appellant paid the Respondents all sums due under their respective contracts of employment.

82. The remaining legal issue is whether the sums paid are sufficient, adequate and commensurate with the provisions of ***Section 49 (1) (c)*** of

the **Employment Act**. S**ection 49(1)(c) of** the **Employment Act**, provides for payment of compensation not exceeding an equivalent of twelve months' gross salary as an alternative remedy toreinstatement available to an employee whoseservices have wrongly been terminated. In considering the quantum of damages in such situation, one of the relevant factors to be taken into account is the affected employee's chances of securing alternative employment. In **Naqvi Syed Omar -v- Paramount Bank Limited & the Attorney - General [2015] e-KLR**, it was the view of the Court that where an employee's attractiveness to potential employers is damaged or diminished as a result of the actions of the employer in the process leading to termination of employment, the Court may grant damages to compensate the lost employability. In the instant case, save for mere and bare allegations, no evidence is on record to demonstrate that the Respondents chances of employability has been diminished due to the Appellant's termination of their contracts of employment.

83. In the instant appeal, the Respondents in their Petition claimed compensation for twelve months salary. No basis for this claim has been made except to cite the provisions of ***Section 49 (1)(c)*** of the Employment Act.

84. If the contract itself provide for an exit clause and the same is terminated lawfully in terms of the said contract, then the employee is only entitled to payment equivalent to the notice period provided in the contract itself. See the decision of the Court of Appeal in **United States International University -vs- Eric Rading Outa [2016] eKLR**.

85. In the instant case are the Respondents entitled to twelve months compensation as claimed?

86. In, **Ol Pejeta Ranching Limited -v- David Wanjau Muhoro [2017] eKLR** the Court of Appeal expressed itself thus:

> **"The compensation awarded to the respondent under this head was the maximum awardable, that is to say, 12 months? pay. The trial judge did not at all attempt to justify or explain why the respondent was entitled to the maximum award. Yes, the trial Judge may have been exercising discretion in making the award. However, such exercise should not be capricious or whimsical. It should be exercised on some sound judicial principles. We would have expected the Judge to exercise such discretion based on the aforesaid parameters. In the absence of any reasons justifying the maximum award, we are inclined to believe that the trial Judge in considering the award took into account irrelevant considerations and or failed to take into account relevant considerations, which act then invites our intervention."**

87. In **CMC Aviation Limited -v- Mohammed Noor [2015] eKLR,** the Court of Appeal expressed itself as follows:

> **"The respondent was serving a two year contract of employment which was terminable by one month?s notice or one month?s salary in lieu of notice. Had the appellant complied with the requirements of *Sections 41* and *45* of the Employment Act, the summary dismissal would have been a fair one. But to the extent that the appellant did not follow the statutory procedure the dismissal was found to be unfair, which we agree. Taking all this into consideration, we think that the respondent was not entitled to twelve months gross pay as compensation for wrongful dismissal. In our view, since the contract of employment was terminable by one month?s notice, we believe that an award of one month?s salary in lieu of notice would have been reasonable compensation."**

88. In persuasive dicta in **Alphonce maghanga Mwachanya -v- Operation 680 Limited [2013] eKLR**, the ELRC Court at Mombasa expressed itself thus:

> **"The question therefore is whether the Employment Act or the Industrial Court Act can now be authority to grant damages for breach of contract under the common law. My simple answer is that the Employment Act, 2007 and the Industrial Court Act have not opened an avenue for this Court to grant damages equivalent to the unserved term of an employment contract. What the Employment Act has done is to empower the Court to award compensation up to a maximum of 12 months gross pay for unfair termination of contract, whether definite, fixed term or indefinite. The only exception would be where the contract of employment provides for payment of salary for unserved part of the contract.**
>
> **The crucial point is whether a remedy of granting compensation or damages equivalent to the salary an employee would have earned were a fixed term contract of employment be terminated prematurely can be located anywhere in section 49 of the Employment Act.**
>
> **To my mind section 49 of the Employment Act is no authority and cannot be the basis for the grant or award of any remedy of damages. Indeed the phrase *"damage(s)"* is not mentioned anywhere in the section. In my considered view section 49(4)(f) of the Employment Act cannot be the legal basis of making an award of damages where a fixed term contract has been terminated prematurely or not been renewed. It just provides one of the factors to consider in granting any or all of the primary remedies set out in sections 49(1) and (3) of the Employment Act.**
>
> **……..**
>
> **From the brief discussion on the position at common law there is no other conclusion which can be reached except that an employee whose fixed term contract is terminated prematurely cannot be granted an award of damages equivalent to the unserved term of the contract under the common law or statutory law in Kenya.**
>
> **Further, it would not make sense and cannot be the intention of the Employment Act or the Industrial Court Act to award employees whose fixed term contracts have been terminated prematurely generous damages equivalent to the salary which could have been earned during remainder/unserved term of the contract and restrict compensation to a maximum of 12 months? for employees who were in permanent employment, but were terminated unfairly. It would not be fair and just as a matter of legal principle to treat employees on fixed term contracts differently from employees on permanent contracts, who**

have been unfairly terminated."

89. The trial court in **Addah Adhiambo Obiero -v – Ard Inc [2014] eKLR** while determining what compensation to award for unfair dismissal observed that: "**having worked for just over two years and taking into account all the circumstances of her case, I think compensation equivalent to two months? salary is reasonable."**

In **Caroline Wanjiru Luzze -v- Nestle Equatorial African Region Limited [2016] eKLR**, the trial court awarded the claimant four (4) months' salary in compensation taking into account the claimant's length of service, employment record as well as the employers conduct in the termination process.

90. 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. Accordingly, we award the 1st, 2nd, 3rd, 4th, 5th, 6th and 8th Respondent each one-month salary for unprocedural termination of their contracts of employment.

91. In their Petition, the Respondents claimed specific damages under the following item heads:

(i) 12 months' salary for unfair termination

(ii) Unpaid salary for the lower of the retirement age of 60 years old.(sic)

(iii) Unpaid leave allowance until retirement.

(iv) Unpaid medical cover until retirement.

(v) Unpaid salary for days worked.

(vi) Underpaid leave days.

(vii) Unpaid salary in lieu of notice.

(viii) Unpaid employer's contribution to NSSF until retirement.

92. 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.

96. In the final analysis, both the Appeal and cross-appeal have merit to warrant variation of the judgment by the trial court.

97. The final Orders of this Court are as follows:

(1) This appeal has merit.

(2) The Cross-Appeal has merit.

(3) The Judgment and decree of the Employment and Labour Relations Court dated 15th September 2014 by Hon. Lady Justice Linet Ndolo and delivered on 16th September 2014 by Hon. Justice Mathews Nduma Nderi in Petition No. 36 of 2013 be and is herebyvaried in the following terms:

(a) A declaration be and is hereby issued that the Appellant* was *not properlyconstituted at the time of vetting the Respondents and making the decision to terminate their contracts of employment.

(b) A declaration be and is hereby issued that the Appellant unprocedurally and unlawfully terminated the employment

contracts of the 1st, 2nd, 3rd, 4th, 5th 6th and 8th Respondents.

(c) Judgment be and is hereby entered for the 1st, 2nd, 3rd, 4th, 5th, 6th and 8th Respondents for the following sums as one month salary compensation for unlawful termination of employment contract.

(1) 1st Respondent (Nicholas Mwenda Mtwaruchiu) Kshs. 393,000/=/.

(2) 2nd Respondent (Peter Murithi Moffat) Kshs.163,482/=.

(3) 3rd Respondent (Kimwele Muneeni) Kshs.363,714/=.

(4) 4th Respondent (Enoch Kimanzi Nguthu) Kshs.321,000/=.

(5) 5th Respondent (Samuel T. Wanjere) Ksh.182,000/=.

(6) 6th (Francis Njeru Mwaniki) Ksh.228,644/=.

(7) 8th Respondent (Fredrick G. Chabari) Ksh.228,643/70.

(d) All statutory deductions to be effected. All other claims by the Respondents against the Appellant be and are hereby dismissed.

(4) The 7th Respondent's (Johnstone K. Chepkwony) claim against the Appellant be and is hereby dismissed in its entirety.

(5) The amount of compensation awarded herein being compensatory in nature shall accrue interest at court rates from the date of judgment by the High Court namely 14th September, 2014.

(6) Both the Appeal and Cross-Appeal having partiallysucceeded, each party is to bear his/its own costs.

Dated and delivered at Nairobi this 20th day of July, 2018.

R.N. NAMBUYE

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JUDGE OF APPEAL

ASIKE MAKHANDIA

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR