IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, M'INOTI & MURGOR, JJ.A.)

CIVIL APPEAL NO. 201 OF 2016

BETWEEN

JOHN GAKUO.....1ST APPELLANT

DR. TIMOTHY MOKI KINGONDU.....2ND APPELLANT

AND

COUNTY GOVERNMENT OF NAIROBI.....1ST RESPONDENT

THE GOVERNOR, NAIROBI CITY COUNTY.....1ST RESPONDENT

THE GOVERNOR, NAIROBI CITY COUNTY.....2ND RESPONDENT

(Appeal from the award and decree of the Employment and Labour Relations Court (Nduma, J.) dated 15*th January 2016* in ELRC Pet. No. 17 of 2015)

****

JUDGMENT OF THE COURT

By the judgment dated 15th January 2016, which is impugned in this appeal, the ***Employment and Labour Relations Court (Nduma, J.)*** held that the ***County Government of Nairobi (the 1st respondent)*** and the ***Governor of Nairobi County (the 2nd respondent)***, had unlawfully dismissed ***John Gakuo, (the 1st appellant),*** and ***Dr. Timothy Moki Kingondu, (the 2nd appellant),*** as members of the ***County Executive Committee***. He awarded them the maximum compensation of 12 months gross salary allowed by ***section 49 (1) 9(c)*** of the ***Employment Act***; gratuity at ***31%*** of their basic salary for their one year and three and half month's of service; and one months salary in lieu of notice. In all, the appellants were each awarded ***Kshs 904, 448.00***. That amount was calculated on the basis of a basic monthly salary of ***Kshs 64,213.70*** for each of them.

The appellants were unhappy with the award, which they have challenged in this Court on two main grounds. Firstly they contend that they were state officers under Article 260 of the Constitution rather than employees under the Employment Act and therefore the learned judge should have awarded them damages for violation of their constitutional rights. Secondly they argue that the learned judge erred by computing their award on the basis of Kshs 64,213.70 instead of ***Kshs 304,375.00***, which was their gross monthly salary.

The respondents oppose the appeal contending that the appellants were dismissed under section 31(1) of the County Governments Act pursuant to which the 2nd respondent had power to dismiss them summarily without a disciplinary hearing. They also contend that the appellants did not seek award of damages in their petition and that having awarded them the maximum compensation allowed by law for unlawful termination, the learned judge could not award the appellants further damages for the alleged violation of their rights because it would have amounted to double compensation.

By way of background, the 2nd respondent appointed the two appellants members of the Nairobi County Executive Committee on 20th June 2013 for a period of five years, and after being successfully vetted by the County Assembly, their appointment was published in ***Gazette Notice No. 9789*** of 5th July 2013. The 1st appellant was appointed to the office of county executive in charge of water, energy, forestry, environment and natural resources while the 2nd appellant became the county executive responsible for health services.

On or about 7th October 2014, the 2nd respondent, abruptly and without any notice or hearing, terminated the appellants' employment with immediate effect. Aggrieved by the dismissal, the appellants filed two separate petitions in the High Court at Nairobi ***(Petition Nos. 167*** and ***168 of 2015),*** contending that their dismissal was in violation of their constitutional rights and in particular ***Article 27 (1), (2) and (3)***

(equality and freedom from discrimination), Art 28 (human dignity), Art 41 (fair labour practices), and ***Art 50 (fair hearing).*** They sought declarations to that effect and an order of certiorari to quash the respondents' decision to terminate their employment. In the alternative they prayed for payment of all their dues for the remainder of the term of their appointment.

The respondents opposed the petitions contending that under ***section 31(a)*** of the ***County Government Act***, the appellants were political appointees who served at the pleasure of the 2nd respondent and that they had failed to demonstrate that the 2nd respondent had exercised his power arbitrarily or unreasonably or that their dismissal was unlawful. They further averred that by virtue of their offices, the appellants were state officers within the meaning of ***Article 260*** of the Constitution to whom the provisions of the Employment Act on dismissal or termination of employees did not apply. Lastly the respondents contended that the High Court did not have jurisdiction to grant judicial review remedies in employment matters.

The two petitions were ultimately transferred to the Employment and Labour Relations Court where they were consolidated and heard as ***Petition No. 37 of 2015***, culminating in the judgment that we have adverted to. The learned judge concluded that although under section 31 of the County Government Act the 2nd respondent could dismiss a member of the county executive without notice or disciplinary hearing, the dismissal had to be based on some reasons, which the respondents did not provide. As regards the alleged violation of the appellants' constitutional rights, the learned judge found that the same were not proved.

In agitating their appeal, the appellants who were represented by ***Mr. Kamwende***, learned counsel submitted, on the first ground of appeal, that the learned judge erred in holding that the appellants had failed to prove violation of their constitutional rights. In their view they had set out with reasonable exactitude their rights that had been violated by the respondents and the manner in which they were violated. It was contended that the violations were lack of procedural fairness and due process arising from failure to inform the appellants of the allegations against them, failure to afford them an opportunity to be heard and to defend themselves and failure to give them reasons for their dismissal. In addition, they contended that their right to fair administrative action under Article 47 of the Constitution was violated by the respondents, as well as their right to dignity, due to the humiliating and degrading manner in which their employment was terminated.

The appellants further submitted that disregard and breach of the bill of rights constitutes gross violation of the Constitution, which the learned judge should not have ignored. They relied on the decision of this Court in ***Narok County Government & Another v. Richard Bwogo Birir [2015] eKLR*** on what constitutes procedural fairness. They also cited ***Martin Nyaga Wambora & 3 Others v The Speaker of the Senate & & Others [2014] eKLR*** on what constitutes gross violation of the Constitution, although we must hasten to note the gross violation which that judgment speaks to is for the purposes of impeachment of a Governor pursuant to ***Article 181(1)(a)*** of the Constitution.

Next, learned counsel submitted that because of the violation of the appellants' constitutional rights, they were entitled to general and exemplary damages as remedies, not only to compensate them for the violation of their rights, but also to deter wrongful behaviour and similar violations. In support of the contention they cited, among others, **Anacherry Ltd v. Attorney General,** ***HC Pet No. 248 of 2013, Peter M. Kariuki v. Attorney General, CA No. 79 of 201***2 and **James Orengo v. Attorney General, HCCC No. 207 of 2002.** They urged us to allow their appeal and award each of them a global sum of Kshs 10 million for violation of their constitutional rights.

On the second ground of appeal the learned counsel urged that the learned judge erred by failing to hold that the appellants, as members of the County Executive Committee, were state officers within the meaning of Article 260(h) of the Constitution and that the Employment Act and the Labour Relations Court Act did not apply to them. He relied on the decision of this Court in ***County Government of Nyeri & Another v. Cecilia Wangechi Ndungu [2015] eKLR*** in support of the proposition.

The appellant's next contended that the learned judge erred by failing to order the respondents to pay them for the unexpired term of their contract of employment. It was submitted that each of the appellants was entitled to Kshs 21,500,833.30 for the unexpired term, which we were urged to award.

Lastly, the appellants submitted that the learned judge had wrongly computed their compensation on the basis of a gross monthly salary of Kshs 64,213.70 instead of Kshs 304,375.00. It was urged that the latter amount was their actual gross monthly salary and that the learned judge had erroneously relied on the former figure, which was the appellants' pay for the seven days that they had worked in the month of October 2017, before the respondents terminated their employment. The appellants relied on their letters of appointment, which indicated that their entry point salary was Kshs 300,000 per month without any future increments.

The respondents, represented by ***Ms. Otieno***, learned counsel, opposed the appeal. They contended that under section 31(a) of the County Government Act, the 2nd respondent had power to dismiss a member of the County Executive Committee if he deemed it appropriate and necessary and that the Act did not prescribe any procedure for dismissal. Alternatively, the 2nd respondent may dismiss such a member under section 40 of the same Act, upon a resolution to that effect by the County Assembly. In this case, it was submitted that the appellants were political appointees, that the 2nd respondent had proceeded under section 31(a) of the County Government Act and that he was not required to hold a disciplinary hearing first. In support of that view the respondent relied on the decisions in **Shadrack Wang'ombe Mubea v. County Government of Nyeri & Another** ***[2015] eKLR*** and **Tom Luusa Munyasya & Another v. Governor, Makueni County & Another [2014] eKLR.**

Next, the respondents submitted that, other than pleading violation of their constitutional rights, the appellants did not particularize with precision the rights that were allegedly violated and the manner in which they were violated and also did not adduce any evidence to prove violation of their right to equality and freedom from discrimination, the right to human dignity and the right to fair labour practices.

On damages, the respondents submitted that the appellant's did not pray in their petition for award of damages, and that having failed to raise the issue before the trial court, they were precluded from raising it for the first time at the appellate stage. They also contended that having been compensated under the Employment Act, the appellants were not entitled to the award of damages that they are seeking in this Court.

As regards computation of the appellants' dues, the respondents submitted that the appellants should not be allowed to blow hot and cold at the same time, in one breath by claiming that they were state officers outside the provisions of the Employment Act and in the other seeking

compensation and computation of their pay under the same Employment Act. Nevertheless, they added that if any compensation was awardable to the appellants it was on the basis of Kshs 64,213.70 per month as held by the learned judge. They accordingly urged us not to disturb the award by the learned judge and to dismiss the appeal with costs.

We have duly considered the record, the judgment of the trial court, the grounds of appeal, the submissions by the parties, the authorities that were cited and the law. As we stated earlier, to our minds the gravamen of this appeal is whether the learned judge erred by applying the provisions of the Employment Act in the relationship between the appellants and the respondents, by declining to award the appellants damages for violation of their constitutional rights, and by computing their compensation on the basis of Kshs 64,213.70 instead of Kshs 304,375.00. From the outset we must agree with the respondents that the appellants are not quite clear whether, as members of the county executive, they were state officers who have nothing to do with the Employment Act or whether they were indeed subject to the Employment Act under which their compensation should be computed.

It is common ground that the appellants were appointed as members of the County Executive Committee pursuant to ***Article 179(2)(b)*** of the Constitution and the provisions of the County Government Act. In **County Government of Nyeri & Another v. Cecilia Wangechi Ndungu *[2015] eKLR,*** this Court held that section 31(a) of the County Government Act grants the Governor power to dismiss a member of the Executive Committee at any time and at his pleasure, subject to exercising that power reasonably, rather than arbitrarily or capriciously. The Court expressed itself as follows:

> **"...Section 31(a) of the County Governments Act does not require the Governor to hold a disciplinary hearing in respect of the said member before dismissal; he can only dismiss if he considers it appropriate or necessary. Appropriateness or necessity is not arbitrariness or whimsical. Appropriateness or necessity imports the requirement that there must be reasons that make the dismissal appropriate or necessary. It is these reasons that determine whether the discretionary power exercised under section 31(a) of the County Governments Act is reasonable or not."**

The Court went further and held that to the extent that ***Article 260*** of the Constitution defines a State Officer to include a member of the Executive Committee of a County Government, the Employment Act, which governs the relationship of an employer and an employee under a contract of employment did not apply to such officers. We would add that a member of the Executive Committee of a County Government who is aggrieved by the termination of his appointment has also the option of lodging a claim for breach of contract against the County Government.

On our part, we affirm the reasoning in ***County Government of Nyeri & Another v Cecilia Wangechi Ndungu*** (supra) and note that even the trial judge in this case agreed with that judgment. He found, properly in our view, that the termination of the appellants' appointment was capricious and arbitrary because the 2nd respondent did not give any reason whatsoever on the basis of which he found it desirable to relieve the appellants of their duty at pleasure. On the other hand, he also found that the appellants had not proved the violation of their constitutional rights as pleaded because all that had happened was termination of their appointment by the respondents, without proffering any reason, which did not amount, strictly speaking, to violation of their right to equality and freedom from discrimination, human dignity, fair labour practices and fair hearing. Having agreed with **County Government of Nyeri & Another v Cecilia Wangechi Ndungu** (supra), the learned judge nevertheless went ahead and applied the provisions of the Employment Act in computing the appellants' compensation.

We would agree with the appellants that being state officers, and following the judgment of this Court in **County Government of Nyeri & Another v. Cecilia Wangechi Ndungu** (supra), which the learned judge applied, he had no basis for applying the provisions of the Employment Act to the relationship between them and the respondents. Having found that the respondents had not properly invoked section 31 of the County Government Act, all that the learned judge should have done is to award the appellants a remedy for breach of their right to fair administrative action under Article 47 of the Constitution and the Fair Administrative Action Act, which they had pleaded and proved. The violation was properly established when the court found that the 2nd respondent had acted arbitrarily and capriciously in relieving the appellants of their offices.

However, a finding that the appellants' right to fair administrative action was violated does not necessarily amount to a finding that their right to equality and freedom from discrimination, to human dignity, and to fair trial were also violated. To prove violation of those rights, the appellants were obliged to adduce cogent evidence, not merely that their appointments were terminated in breach of statute. For example, to prove violation of their right to equality and freedom from discrimination, the appellants were obliged to adduce evidence that by their termination was based on differential treatment on the grounds prohibited by Article 27 (4) of the Constitution such as race, sex, ethnic or social origin, and religion, among others, which they did not do. (See ***Ol Pejeta Ranching Ltd v. David Wanjau Muhoro [2017] eKLR).***

In the same vein, unlawful termination of appointment does not *per se* prove violation of the right to human dignity, which is prohibited by the Constitution. As the Constitutional Court in South Africa observed in ***Dawood & Another v. Minister of Home Affairs [2000] ZACC 8***, violation of the right to human dignity may be occasioned by breach of specific rights such as bodily integrity, the right to equality, or the right not to be subjected to slavery, servitude or forced labour. Whilst those are examples rather than a closed catalogue, to enable the court conclude that the right to dignity has been breached, violations of that nature or character must be proved by cogent evidence (See for example **COI & Another v. Chief Magistrate, Ukunda Law Courts & 4 Others [2018] eKLR).**

Other than the bare pleadings, the appellants appear to have assumed that proof of violation of the right to fair administrative action would automatically amount to proof of violation of the other rights that they alleged were violated. We are not persuaded. As the respondents also correctly argue, the appellants did not specifically pray for damages for the alleged violation of those rights. The remedies they sought in their respective petitions were as follows:

> **"Your petitioner therefore humbly prays for:**
>
> > **a. a declaration that the act of the 2*nd respondent in relieving the petitioner of his duties is a breach of the latter's constitutional rights under Article 27(1) (2) and (3), 28, 41 and 50 of the Constitution of Kenya and that the same is null***

and void for all intents and purposes.

b. An order for judicial review to remove into this Honourable court and quash the decision of the 2*nd respondent relieving the petitioner of his duties as County Executive in charge of Water, Energy, Forestry, Environment and Natural Resources.*

c. In the alternative and without prejudice to prayer (b) above, an order of payment of all dues to the petitioner in the period he would have served between now and the end of term in compensation.

d. Any other relief or order this Honourable court may deem fit to grant."

Contrary to the appellant's submissions, there was no basis for making an order for payment of their salaries and benefits for the remainder of their contracts. As we have already stated, under section 31 (a) of the County Government Act, the 2nd respondent had the power to terminate the appellant's appointments at any time so long as he was not acting capriciously or arbitrarily. That provision did not guarantee the appellants appointment until the end of five years. In ***Kalpana H. Rawal v Judicial Service Commission & 3 Others [2016] eKLR***, this Court stated that a public office is not a property to which an officer is entitled until the end of the contract or retirement and further that an officer is not entitled to pay for a period he expects to work, but has not in fact worked. The Court quoted with approval the decision of the Supreme Court of the Unites States of America in ***Butler v. Pennsylvania, 10 How. 402: 13L. ed. 472*** where it was stated:

> **"...promised compensation for services actually performed and accepted during the continuance of the particular agency may undoubtedly be claimed, both upon principles of compact and of equity, but to insist beyond this on the perpetuation of a public policy either useless or detrimental, and upon a reward for acts neither desired nor performed, would appear to be reconcilable with neither common justice nor common sense. The establishment of such a principle would arrest necessarily everything like progress or improvement in government, or if changes should be ventured upon, the government would have to become one great pension establishment on which to quarter a host of sinecures."** [Emphasis added].

We have come to the conclusion that the appellants were entitled to compensation for violation of their right to fair administrative action and not under the Employment Act as the learned judge proceeded. We therefore set aside the award of Kshs 904,448.00 and substitute therefore an award of ***Kshs 1,500,000.00*** to each appellant as damages for violation of their right to fair administrative action. The appellants were not entitled to any further damages for violation of their other constitutional rights, which were not proved. Save to that extent, this appeal is bereft of merit and is dismissed in its entirety. We direct each party to bear its costs in this appeal. It is so ordered.

Dated and delivered at Nairobi this 13th day of July, 2018

P. O. KIAGE

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR