



**Ithai v Kenyatta National Hospital (Cause 225 of 2019)  
[2024] KEELRC 387 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 387 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 225 OF 2019  
J RIKA, J  
FEBRUARY 29, 2024**

**BETWEEN**

**SIMON MUNGATHIA ITHAI ..... CLAIMANT**

**AND**

**KENYATTA NATIONAL HOSPITAL ..... RESPONDENT**

**JUDGMENT**

**Pleadings**

1. The Claimant filed his Statement of Claim, dated 3<sup>rd</sup> April 2019, amended on 13<sup>th</sup> April 2021.
2. He states that he was employed by the Respondent Hospital, for 13 years.
3. He was employed, pursuant to a letter of confirmation in appointment and admission to the permanent and pensionable establishment, dated 2<sup>nd</sup> April 2007.
4. He last earned a gross monthly salary of Kshs. 254,040.
5. He served as the Manager, Marketing and Communications, and Head of Department/ Head of Corporate Affairs and Communication Department.
6. He was suspended by the Respondent, through a letter dated 13<sup>th</sup> November 2018. He was asked to show cause why disciplinary action should not be taken against him. It was alleged by the Respondent, that he had used his position to solicit money and sexually harass Hospital Client[s], contrary to *Public Officer Ethics Act*.
7. The allegations were misconceived, capricious and malicious. No such allegations had ever been made previously, in his 13 years of service.



8. He states that suspension was influenced by an interested individual, the Respondent's supplier. The Respondent ought to have subjected the allegations to the investigation of the relevant, constitutionally mandated bodies, the DCI and EACC.
9. Thorough investigations did not take place before the disciplinary hearing. Top Management Officers did not record statements.
10. Disciplinary hearing took place on 22<sup>nd</sup> May 2019 and 3<sup>rd</sup> June 2019, presided over by an illegal Management Disciplinary Committee, as opposed to the Human Resource Committee of the Board. The Committee had no jurisdiction to preside over the disciplinary case. All proceedings and decisions against the Claimant were therefore null and void ab initio.
11. Proceedings offended rules of natural justice. Persons who could not give the Claimant a fair hearing, refused to recuse themselves. Some of reasons given in justifying termination, were not part of the reasons over which the Claimant was suspended. The Respondent did not give evidence. The disciplinary proceedings served as a forum for punishment of the Claimant, for having blocked illegal procurement services by Blue Media Images Limited. Procurement offended Respondent's Procedures, established by the Treasury, and an Executive Order made by the President.
12. The Treasury Circular, Executive Order, and Public Procurement Act require that, Supply Management Chain [SCM] must receive exemption or no-objection from the Government Advertising Agency [GAA]. No exemption or no-objection had been obtained by the Respondent.
13. Procurement, contrary to law and practice, was set in motion by the supplier, rather than the Respondent. Procurement was not made in good faith. Supply Chain Management initiated procurement, and made a request to the Claimant, to allow them use the Corporate Affairs and Communication budget, which he declined. Later the Supply Chain Management, on behalf of the supplier, approached Corporate Affairs and Communication Department to initiate on its behalf corrupt procurement of advertising services. The Claimant was put under pressure to sanction corrupt procurement.
14. Dr. Peter Masinde, Abdallah Ofula, John Miringu and Joan Njeri Wambu, signed professional opinion for advertising in Blue Media Images Limited, in disregard of procurement requirements. They were officers of the Respondent, but acted as agents of Blue Media.
15. The said persons and Deputy Director Finance, Michael Kihuga, prepared and signed the Local Service Order, and allocated money for advertisement contrary to procurement requirements.
16. Mutie the CEO, Masinde, Njoroge, Ofula, Miringu, and Wambu, acted in breach of the contractual duty of fidelity of an Employee to the Employer, and the duty of fiduciary of senior Employees to act in the best interest of the Employer.
17. The Disciplinary Committee ignored the Claimant's advice and Supply Chain Management Internal Memorandum, the Treasury Circular and Executive Order.
18. The Claimant was charged with the following offences: -
  - a. Solicitation of a bribe in the amount of Kshs. 50,000 from one Wilberforce Akidiva Mwenesi and one Emily Ndila Katiku, Employees of Blue Media, to facilitate in the processing of procurement of advertising services in the Kenya Medical Practitioners and Dentists Board [KMPDB] magazine.



- b. It was alleged that the Claimant met Mwenesi and Katiku in and out of the Respondent Hospital, where he demanded to be paid Kshs. 283,000 being 15% value of the advertisement tender, which was to be done by Blue Media. It was alleged that the Claimant took Mwenesi and Katiku to Upper Hill Equity Centre, where he was paid Kshs. 50,000 as down payment, so that he signs the Local Service Order. It was alleged further that the Claimant and the said persons agreed to meet again on 27<sup>th</sup>-28<sup>th</sup> October 2018, to receive/pay half of the bribe of the Kshs. 283,000 demanded. It was said that the two officers of Blue Media declined to bribe the Claimant, causing the Claimant to suspend and recall the Local Service Order, justifying his decision on failure by the involved parties to obtain approval of Government Advertising Agency [GAA].
  - c. It was alleged that the Claimant met the two officers from Blue Media, on 3<sup>rd</sup> November 2018, and agreed to refund Kshs. 47,000 out of Kshs. 50,000 already received by him in bribery.
  - d. He allegedly sexually harassed Katiku.
  - e. He allegedly made a report to DCIO Kilimani, but declined to cooperate and respond to relevant issues.
19. In preparation of the disciplinary hearing, the Claimant requested for copies of statements from his accusers; charge sheets; and witness statements. He asked for all evidence intended to be adduced against him. This included a letter from the CEO of the KMPDB which introduced KMPDB and Blue Media Directors to the Respondent; professional opinion on the procurement; and minutes of a meeting chaired by CEO Mutie on 8<sup>th</sup> November 2018, attended by the Claimant's accusers. The Respondent did not supply evidence intended to be adduced against him by witnesses, and minutes of the meeting chaired by Mutie on 8<sup>th</sup> November 2018.
  20. At the hearing, he objected to the membership of Rose Njoroge, Director of Supply Chain Management; C. Odiang'o the Chairman, who was Deputy Director of Finance and Njoroge's boss; Michael Kihugu, Deputy Director Finance and Administration; and Calvin Nyachoti, Corporation Secretary.
  21. He raised objection in Court, on involvement of Njoroge. The Court agreed with him, directing further, that any other panellist, who was biased against the Claimant, should recuse himself. He applied for recusal of Odiang'o. He did not recuse himself.
  22. No witness was called to support the charges. Instead, the Committee invited the Claimant to comment on the 1<sup>st</sup> charge. The Committee proceeded on the presumption that the Claimant was guilty. The burden of proving otherwise was placed on the Claimant.
  23. His response was that he did not solicit for any bribe. He explained that the Blue Media procurement was carried out in violation of procurement requirements. Blue Media had captured the CEO and his officers, making a mockery of the Treasury Circular and the Executive Order. He denied that he met Mwenesi and Katiku and demanded for a bribe, in the sum of Kshs. 283,000. He was not paid any amount in alleged down payment of the bribe. He did not meet Mwenesi and Katiku, and refund any money paid in bribery. He denied that he sexually harassed Katiku. He denied that he in any way, failed to cooperate with investigators.
  24. He received termination letter after the hearing. He filed an Appeal on 3<sup>rd</sup> July 2019 to the Human Resource Committee of the Board. The Committee did not acknowledge his Appeal.



25. If any hearing took place on appeal, it was secretive, and decision was communicated through P.O. Box 365, an address the Respondent knew, the Claimant was not using. He learnt that there was a decision to uphold dismissal decision, when he went to the Respondent's offices, to collect his half-monthly salary, payable during suspension.
26. The Claimant states that the disciplinary action was contrary to *the Constitution*, the Public Service Commission Disciplinary Manual, 2016, the Public Officers Ethics Act and *Employment Act*. He prays the Court to find that, the Respondent acted unfairly, unlawfully, and unconstitutionally.
27. He prays for: -
  - a. Permanent injunction restraining the Respondent and/or other persons acting for the Respondent, from employing another person to perform the duties of Head of Corporate Affairs and Communication, also known as Manager, Corporate Affairs and Communication, Job Group KNH 5.
  - b. Declaration that the purported termination of the Claimant's contract of employment by the Respondent, in May 2019 is null and void.
  - c. Permanent injunction restraining the Respondent and /or other persons acting for the Respondent, from employing another person to perform the duties of Manager, Marketing and Communications and Head of Corporate Affairs and Communication.
  - d. The Respondent to lift the Claimant's suspension immediately and allow him to continue performing his duties of Manager, Marketing and Communications and Head of Corporate Affairs and Communication.
  - e. The Respondent to pay the Claimant his salary arrears and other benefits of Kshs. 4,255,000 as of March 2021.
  - f. The Respondent is barred from subjecting the Claimant to disciplinary action, pending investigation of the DCI.
  - g. Terminal benefits and 81 days of annual leave.
  - h. Any other suitable order.
  - i. Costs and interest.
28. The Respondent filed its Statement of Response, dated 5<sup>th</sup> November 2021.
29. Its position is that there is no position of Head of Marketing and Communication in its structure. The Claimant's attempt to assign himself the position of Head of Communication Department is misplaced. It is the Employer's mandate to give job designations.
30. Without prejudice, the Respondent pleads that the Claimant held the position of Chief Corporate Affairs and Communications, Job Group K5, a position he held from 31<sup>st</sup> March 2009.
31. It is true that he was suspended on allegations which touched on his integrity and general conduct. The Respondent has its own internal systems and processes to undertake administrative investigations, which it applied. It received a complaint against the Claimant in November 2018, and invoked its internal mechanisms to investigate and take appropriate actions. His employment was terminated on 13<sup>th</sup> June 2019, and his prayers seeking orders of permanent injunction against the Respondent, from employing another officer and from disciplining him, have been overtaken by events.



32. After concluding its own investigations, the Respondent issued the Claimant with a letter to show cause, spelling out details of misconduct. It is true that he moved the Court to stop the disciplinary process. The application was declined, the Court holding that it is not its role, to supervise disciplinary proceedings.
33. The Claimant was not a Board appointee. He was a Management appointee. The Management Committee had jurisdiction to preside over the disciplinary hearing.
34. The Respondent states that it was not in the place of the Claimant, to advise the Respondent, on how workplace investigations should be carried out.
35. The Claimant did not give any particulars of conflict of interest, against any member of the Disciplinary Committee. His intention was to delay disciplinary hearing.
36. The Claimant was granted a fair hearing. He was suspended; issued letter to show cause; invited for hearing; and was heard. He was granted the right of appeal, which he exercised unsuccessfully. The disciplinary process was in compliance with the Employment Act. The Respondent prays the Court to dismiss the Claim with costs.
37. The Claimant gave evidence, and rested his Claim, on 22<sup>nd</sup> February 2023. He re-opened his case upon the application of his Counsel on 26<sup>th</sup> July 2023, and continued with his evidence, on redirection. He closed his evidence on 26<sup>th</sup> July 2023.
38. Carrilus Ochieng', a Human Resource Officer of the Respondent, gave evidence on 26<sup>th</sup> July 2023, closing the hearing. The Claim was last mentioned on 31<sup>st</sup> October 2023, when Parties confirmed filing and exchange of Closing Submissions.
39. Dr. Kamau Kuria for the Claimant, opened the hearing with a brief summation of the Claim. He explained that the Claim is based on the Amended Statement of Claim. The Claimant approached the Court while he was still in employment, for provisional measures. He was subjected to disciplinary proceedings, and dismissed. He filed an Appeal, which was purportedly heard and dismissed. The Claimant seeks three categories of remedies- declarations, permanent injunctions, and damages in event he is not reinstated.
40. Dr. Kamau Kuria submitted that the Claim is founded on breach of contract. In event the Respondent wished to discipline the Claimant, it was bound to use a proper Disciplinary Committee. This was the Board of Management Staff Disciplinary and Advisory Committee. The Claimant was instead subjected to the Management Staff and Advisory Committee. The process was null and void ab initio, for want of jurisdiction.
41. The second limb in summation of the Claim, is that Senior Management of the Respondent had been captured by corrupt suppliers of services. When the Claimant refused to support a corrupt supply, he was subjected to the actions which gave rise to this Claim.

#### **Claimant's evidence.**

42. The Claimant relied on his Witness Statement and Documents dated 3<sup>rd</sup> April 2019, and 12<sup>th</sup> April 2021, page 1 to 418, in his evidence-in-chief. He emphasised that he was victimized over his unwavering stand on corruption.
43. Cross-examined, he told the Court that, at paragraph 5 of his Supplementary Witness Statement, he states he was in job group K7. He had a letter of appointment.



44. He was interviewed by the Board of Management, led by its Chair. He was interviewed for job group K5, but employed as job group K7. He did not raise a complaint, because he had been assured he would get the job.
45. He was not given a letter as a Manager. From K7 to K5, letters were issued. No letter was issued as a Manager.
46. When he was Chief Officer, there was no Manager. He was Head of Department. Manager's role came in 2014. Letters were not provided. There were no interviews conducted. There was a lapse in procurement procedures. A complaint was lodged against the Claimant. He took action after the complaint.
47. He refused to authorize procurement, where requisition was raised by Supply Chain Department. The Deputy Director Supply Chain, discussed the issue with the Claimant and confirmed that the Claimant, not Supply Chain, should raise the requisition.
48. The Respondent was not to take action, without authorization from the Government Advertising Agency. The Claimant advised that the Respondent, awaits such authorisation. He did not communicate to the CEO. It had not reached the CEO's level. The CEO had facilitated the others to initiate the procurement process. The Claimant could not run to him. The matter could be dealt with without the involvement of the CEO.
49. The process was concluded, and tender awarded. It was irregular. The Claimant was accused of bribery when he had already given his advice. He reported the matter to the DCI, after he had been accused of bribery.
50. Award of tender was done with the Claimant's requisition. He would have reported to the CEO, if he knew that the process would go on, without regard to his advice. The supplier he reported to the DCI, was the same supplier who allegedly bribed the Claimant.
51. The Claimant was presented with the charges. There were witness statements, to support the charges. He was given an opportunity to respond to the accusations. He was given about 20 days to respond. There was adequate time to prepare. He had a fellow Employee at the hearing. He was not given adequate time to respond, at the actual disciplinary hearing.
52. Some individuals with an interest in the matter did not disqualify themselves. The Claimant was not allowed to tender his evidence. He appealed the decision to terminate his contract, to the Chair of the Board. A determination was made, upholding the initial decision. The Claimant had asked the Court to restrain the Respondent from proceeding with the disciplinary process. It was the position of the Court, that disciplinary hearing should go on. The Claimant was paid half-monthly salary during the disciplinary process. Termination was unfair. The Claimant did not commit any wrong.
53. The Employees were taken through the Terms and Conditions of Service. They were not taken through the Human Resource Manual, which came into effect in 2019.
54. Redirected, the Claimant told the Court that the Human Resource Manual and the Terms and Conditions of service are different. The Human Resource Manual has more material, and defines procedure on job groups. The Manual adopted in 2019, disadvantaged the Claimant. The Terms and Conditions of Service provided for Board of Management Staff Disciplinary and Advisory Committee. The Claimant was not taken through the correct disciplinary procedure.
55. The Management Staff Disciplinary Committee did not have the same composition envisaged in the Board of Management Staff Disciplinary and Advisory Committee.



56. The Claimant complained about the composition of the Disciplinary Committee. He complained about the inclusion of Njoroge, Kihuga, and Odiang'o. These were officers who were involved in the disputed procurement. The Corporation Secretary, a Lawyer, Calvin Nyachoti, told the Claimant not to introduce sideshows. Objection on the composition of the Committee was overruled. The Corporation Secretary told the Claimant to continue with the proceedings, and if he did not, a decision had already been made anyway.
57. The complainants and makers of witness statements did not attend hearing. Hearing took only 30 minutes. The Respondent acted as witness, prosecutor, judge and executioner.
58. The Claimant wrote a letter of appeal. It took a year to be responded to. He was not invited to argue the Appeal. He was not notified that the Board would meet, and consider the Appeal.
59. Page 115 to 118 of the Claimant's documents contain performance contract executed between the Claimant and the CEO. The Claimant executed as the Marketing and Communications Manager. At page 124, the Claimant is referred to as the Public Relations Director. In 2014 the Human Resource Office referred to the Claimant as Communications Manager. The Claimant was in job group K5. He was a Manager and Head of Department. In 2007, Communications was the Public Relations Department. In 2012, the CEO Dr. Lesiampe asked the Claimant to come with another name for the unit. It became the Corporate Relations. It later became Communications and Public Relations Department.
60. There was harmonization of Managers, in March 2010 as shown at page 157 of the Claimant's documents.
61. Managers in administration, were in lower category, than those in clinical ranks. The paper on harmonization sought to correct this. It was observed that below Directors, are the Heads of Departments. There was disparity in Managers. Clinical Managers were mostly in job groups K3, K4 and K5.
62. There was discrepancy between K5 and K7. Advertisement announced vacancy for K5. The Claimant was interviewed by a Committee of the Board. After interview, he was however placed in K7, instead of the advertised K5. He sought clarification and was told this would be rectified. He was remunerated in accordance with the scale applicable to job group K5. K3 was higher than K5. The Claimant and his colleagues were asking the Respondent to bring them at par with Clinical Managers, at K3.
63. He was Head of Department in 2009. The managerial aspect came around 2012. The Respondent admits that the Claimant was Head of Department. He was paid telephone allowance, which only applied to Heads of Department.
64. Blue Media was introduced to the Respondent. It was to provide a Health Practitioners' Directory. It would publish the Directory. KMPDB wanted the Respondent to pay for the advertisement. The Respondent is a public entity. KMPDB and Blue Media are private entities. The Respondent was being told to pay costs of advertisement for KMPDB.
65. Dr. Masinde received the request from Blue Media, on 17<sup>th</sup> June 2018. He advised the Deputy Director Supplies Chain, Rose Njoroge, to "see how to procure the space."
66. The request was forwarded to Acting Deputy Director Abdallah. He wrote to the Chief Supplies Officer Miringo. Njoroge, Abdallah and Miringo were not in the Claimant's Department.



67. The letter came to the Claimant, when the officers above, realized that they did not have a budget to push the transaction through. They now wanted to use the Claimant's budget. They had already written a requisition for the approval of the Director. The letter was taken back to Supply Chain.
68. The letter was brought back to the Claimant by Joan, Abdallah and Miringo. The Claimant emphasized that his department was the user, and it then dawned on his colleagues, that he had refused to tag along.
69. It was agreed that the Claimant raises the requisition, after he had been directed by Supply Chain. He wrote requisition on 16<sup>th</sup> October 2018 addressed to the Deputy Director Supply Chain. The Claimant undertook to avail the funds, because the matter had been discussed with Dr. Masinde.
70. All advertisements outside the Government Advertising Agency had been banned by the Treasury and the President. Supply Chain would have to seek waiver of the Treasury Circular and the Executive Order, to enable the Respondent contract Blue Media for the service. No waiver had been given.
71. Local Service Order was written by Supply Chain. They advised the CEO. The Claimant's Deputy signed the LSO in his absence. The Claimant was signatory to the account. His Deputy explained that he was pressured to sign by Blue Media's frontman, Mwenesi.
72. The Claimant reviewed the LSO. He realized there was no waiver from the Government Advertising Agency, to advertise. He advised that the LSO is suspended. He wanted to ensure that the Respondent was compliant. His advice was disregarded and tender awarded to Blue Media, behind his back.
73. The Claimant was suspended in 2018. Disciplinary hearing took place under rules which came into force in 2019.
74. He was alleged to have received Kshs. 50,000 from Mwenesi and Katiku from Blue Media. Mwenesi and Katiku did not appear at the disciplinary hearing. They were the tender beneficiaries.
75. The Claimant was accused of meeting Mwenesi and Katiku, and demanding a bribe for the amount of Kshs. 283,000. He was alleged to have received Kshs. 50,000 upfront. This charge was fabricated by Blue Media.
76. The Claimant embargoed the procurement before bribery allegations were made. Blue Media realized the Claimant was standing in their way, and fabricated accusations about bribery and sexual harassment.
77. It was alleged that the Claimant recalled the LSO, when he disagreed with Blue Media; that he refunded Kshs. 47,000; and sexually harassed Blue Media's Katiku. No money had been paid to the Claimant by Blue Media. He did not sexually harass Katiku. Katiku stated that she was always in the company of Mwenesi, except on one occasion. On this occasion she had demanded that the Claimant signs the space order. He declined because it was not his role to sign. His office was open space, with other staff around, making it unlikely for him to sexually harass Katiku.
78. The Claimant was suspended on half basic salary, house allowance and medical allowance. He was to report to Deputy Human Resource Manager once a week. He complied with these terms.
79. He was asked to show cause. He responded. He asked for certain documents, to assist in his response, which were not availed. The letter at his page 379 was not availed, until after the disciplinary hearing.
80. At the hearing, he was not allowed time to refer to his response to the NTSC. Hearing was completed in about 30 minutes. He was told a decision had already been made. There were 8 members. Only the Chair and the Corporation Secretary asked questions. The Court had ruled that the Committee



be composed of impartial members. Rose, Carylus, Michael and Calvin were conflicted. Carylus was in charge of security and directly linked to Human Resource. He was supposed to be evaluating the Claimant's case. He wrote to the Claimant's Advocates saying that the Staff Disciplinary and Advisory Committee had reviewed the Claimant's case, even before he had appeared. The Respondent wrote to the Claimant before the hearing, warning him that sideshows, would not take him far. Michael was Head of Finance who authorized LSO.

81. The Claimant's colleague, a trade union representative was not allowed to speak. He was told his role was to listen. The Secretary to the Committee told the Claimant that his fate was sealed, and that he could only sue Mwenesi for defamation. Dismissal letter states that it was highly likely, that the Claimant received a bribe. It was alleged that the Claimant made a partial refund of the bribe. There was no money received by him.
82. The Claimant was Head of Department and Corporate Affairs Manager. The right Committee to hear him, would be chaired by a member of the Board with representatives from the relevant Ministries and Institutions. The Human Resource Manual was adopted after the Claimant was charged. It was applied to prejudice the Claimant. The Claimant had been provided the Terms and Conditions of service of 2010-2011, which were applicable. The 2019 Human Resource Manual was new, and did not mention the Terms and Conditions of Service 2010 - 2011.
83. Dr. Masinde met with Blue Media officers, and was determined to push through the corrupt procurement. He allowed the transaction to go on through the back door. The Claimant prays the Court to allow the Claim.

#### **Respondent's evidence.**

84. Carrilus Ochieng,' adopted his Witness Statement and Documents exhibited by the Respondent, as his evidence-in-chief.
85. Cross-examined, he told the Court that he was part of the secretariat to the Disciplinary Committee. Notes were recorded. The attendants are shown in the minutes.
86. Hearing took place in May-June 2019. The Human Resource Manual was approved in September, 2019. There was no deviation from the Manual. It was just a matter of realigning certain matters.
87. There is a Board of Management Committee, which deals with Respondent's Directors and Managers. The Claimant sat in the Department of Marketing. He was senior most. He could act as the Head of Department, before substantive appointment.
88. The Human Resource Manual at page 101 of the Claimant's documents, clause 11.2.1, states that the CEO, will handle disciplinary matters of Employees in certain grades. The Claimant fell within the job grades handled by the CEO. There was no discrepancy between the Human Resource Manual and the Terms and Conditions of Service. The only divergence was that the Human Resource Manual did not specify the persons, to compose the Committee.
89. The Manual 2019, clause 11.2.2, shows staff to be disciplined at Board level. The Claimant was not a substantial Head of Department. 8 persons heard the Claimant. They were not members of the Board; they were in top Management. It was the right Committee. The Claimant was at grade K5.
90. The letter of dismissal states that the Claimant appeared before the Staff Disciplinary and Advisory Committee. Carrilus did not agree with the Claimant, that the Claimant was taken before an ad hoc Committee. There were no Directors in 2010-2011, but Assistant Directors.



91. The letter inviting the Claimant to the hearing, referred to Terms and Conditions of 2010-2011. The Claimant was not at K3; he was at K5.
92. The Respondent advertised his acting position. The Claimant went to Court seeking quashing of the advertisement. The Court did not agree with him.
93. He was acting, not substantive Head of Department. There was no letter appointing him, as Head of Department.
94. In the performance management document at page 114 of his documents, he was referred to as a Manager by the Respondent. It was not necessary to describe him as acting Manager, in the document. Page 157-159, includes Chief Public Relations Officer, as a Manager. The Claimant knew that the position of Manager was not substantively filled.
95. Mwenesi and Katiku, the alleged bribe givers, did not testify at the disciplinary hearing. Mwenesi communicated to Dr. Masinde through e-mail, seeking certain information. Mwenesi referred to a meeting held between him and Dr. Masinde in the latter's office. Mwenesi stated that work was already in progress. It related to KMPDB directory. This Board, is not a department of the Respondent. The Claimant held the position that procurement could take place, subject to the applicable Government regulations. Dr. Masinde approved the transaction. The Claimant did not raise issues with the approval. He could have raised issues in his note to Dr. Masinde.
96. There was in place, a Circular from the Treasury and an Executive Order from the Office of the President. Approval was required from My Gov, before publication in any other platform. The Claimant sought clarification from the Director, on authorization.
97. Departments work together. The Claimant's Department did not originate procurement. Money to finance the tender would come from his Department. He was the AIE holder.
98. Carrilus disagreed with the Claimant, that the Disciplinary Committee was a Kangaroo Court. The Claimant was not framed. Government offices do not frame individuals. Members of the Disciplinary Committee were not called in Court by the Respondent, as Witnesses. There was no conspiracy against the Claimant.
99. Redirected, Carrilus told the Court that the Claimant was recruited in job grade K7. In 2009, he entered job grade K5. Head of Department sat at K3. Positions were later harmonized. The position for Head of Marketing was advertised. The Claimant went to Court, seeking to block the advertisement. The Court rejected his position, holding that he was not a substantive holder of the position. He signed documents as acting Head of Department. He did not object to the composition of the Disciplinary Committee. Carrilus was part of the Secretariat, and did not witness the Claimant objecting to composition of the Disciplinary Committee.

### **Submissions.**

100. Citing Prof. Charles Reich in 'The New Property' page 738 -739 and the Supreme Court of New Jersey in *Wolley v. Hoffman La-Roche. Inc.* 101 N.J. 499 A.2d 515 [1995], the Claimant submits that a profession, a job or a right to receive an income, are the basis for various statuses in society, and may therefore be the most meaningful and the distinctive wealth a person possesses. Therefore, job security is the assurance that one's livelihood, one's family future, will not be destroyed arbitrarily. The Claimant submits that he has established that his employment was terminated by the Respondent arbitrarily.



101. The Terms and Conditions of Service, revised in 2010-2011, governed the Claimant's contract. The Claimant's contract was terminated by a Disciplinary Committee which did not have the mandate, under the Terms and Conditions of Service. Jurisdiction is everything, and a decision made without jurisdiction, is null and void. The Claimant submits two decisions of the Court of Appeal, Owners of the Motor Vehicle 'Lillian S' v. Caltex Limited 1989 EA 1 and Civil Appeal No. 64 of 2016, Lemita Ole Lemein v. AG. He also relies on a decision of this Court sitting at Bungoma, in Cause No. 32 of 2021, Kenya Union of Clinical Officers & Others v. Vihiga County Government. He reiterates that a decision taken by a body without power is a nullity, invoking the decision of the House of Lords, in *De Souza v. Tanga County Council* [1961] EA 377 at page 387.
102. Administrative actions, like judicial actions, demand that the accused is granted a fair opportunity to be heard, as held in *Geothermal Development Company Limited v Attorney-General & 3 others* [2013] e-KLR, and *O'Donoghue v. South Eastern Health Board* [2005] 4 IR 217.
103. Article 41 of *the Constitution*, guarantees the right of fair labour practices. It comprises implied terms to every contract of employment. The Claimant was denied the right, and subjected to an arbitrary and capricious exercise of state power wielded by the Respondent.
104. The Claimant submits that he is entitled to the remedies pleaded. He cites the Supreme Court of Kenya in *Gichuru v. Package Insurance Brokers Limited*, [Petition 36 of 2019] [2021] KESC 12 [KLR] [22<sup>nd</sup> October 2021] [Judgment], where the Petitioner was paid general damages for discrimination, 12 months' salary in compensation, notice and salary for days worked in the month of termination. The Claimant is entitled to damages for breach of contract and contravention of his rights under *the Constitution*.
105. Lastly, the Claimant, relying on *Republic v. Communication Authority of Kenya & Another, ex parte Legal Advice Centre, a.k.a. Kituo Cha Sheria*, [2015] e-KLR, submits that the Respondent's actions necessitated the filing of the Claim, and the Respondent is bound to meet the costs of the Claim,
106. The Respondent submits that the Claimant was never appointed to the position of Head of Marketing and Communication, which was job group K3 [Q]. He was Chief Public Relations Officer job group K5[N]. he held the latter position until termination. This was confirmed by the Court in its ruling, when the Claimant moved the Court, to restrain the Respondent, from advertising for the position of Head of Marketing and Communication.
107. The Respondent, relying on Court of Appeal decision in *Muthaiga Country Club v. KUDHEIHA* [2017] e-KLR, states that it had substantive grounds to justify termination, under Section 47[5] of the *Employment Act*.
108. Procedure was fair. The Claimant was suspended. He was notified that the Respondent was investigating him for allegations of bribery. Suspension was in accordance with the decisions of the Court in *Mwaura Mbugua v. Kagwe Tea Factory & Another*, Industrial Court Cause Number 78 of 2011 and *Bartholomew Wanyama v. Moses Gitari & 2 Others*, Industrial Court Cause No. 973 of 2011. Suspension is not an end in itself, but is meant to facilitate investigations.
109. He was invited for disciplinary hearing on 22<sup>nd</sup> May 2019. There was no statutory requirement on the composition of the Disciplinary Committee. The Terms and Conditions of Service 2010-2011, dictated composition of the Disciplinary Committee.
110. The Hospital Staff Disciplinary and Advisory Committee, comprised:
  - a. Director of Clinical Services.



- b. Director Finance, Planning and Development.
  - c. Deputy Director Nursing Services.
  - d. Deputy Director Medical Services.
  - e. Chief Manager Finance.
  - f. Chief Manager, Internal Audit.
  - g. Chief Manager Supplies and Procurement.
  - h. Chief Manager Corporate Affairs.
  - i. Chief Manager Human Resource.
111. This Committee dealt with disciplinary cases involving Professional Staff [PS] and General Staff [GS]. The Claimant fell in this category, under the Code of Conduct, the Disciplinary Committee Rules of Business, the Internal Memo by the Commissioner General dated 17<sup>th</sup> April 2008, letter by Head of Public Service dated 24<sup>th</sup> May 2010 and the Rules and Regulations Governing Discipline and Grievances.
112. The Respondent submits that the Claimant complained before the Court about the composition of the Disciplinary Committee, and that the Court directed the Committee to be composed of impartial persons.
113. The Respondent convened an impartial Disciplinary Committee, in accordance with the directive of the Court.
114. It was not incumbent upon the Respondent, to call witnesses to be cross-examined by the Claimant. The Respondent relies on the decision of the Court in Patrick Abuya v. Institute of Certified Public Accountants of Kenya [ICPAK] & Another [2015], where it was held that it is not incumbent upon an Employer, to carry a quasi-judicial investigation into allegations of misconduct, with confrontation of, and cross-examination of witnesses. Unless the circumstances warrant, an Employer is not expected to hold a mini court.
115. The Respondent submits that the prayer for permanent injunction is misconceived. Head of Marketing and Communication and that of Manager, Corporate Affairs and Communication are different positions. The prayer for reinstatement is prohibited under Section 12 [3] of the E&LRC Act. The Court of Appeal in Sotik Highlands Tea Estates Limited v. Kenya Plantation and Agricultural Workers Union [2017] e-KLR upheld this statutory bar.
116. The claim for arrears of salary beyond the date of dismissal, would amount to unjust enrichment. It would be against public policy, to pay the Claimant salary for no service.
117. The restraining order, pending investigation to be undertaken by the DCI has been overtaken by events, disciplinary process having taken place, and ended with the dismissal of the Claimant. Criminal suspicion, in any event did not bar the Respondent from carrying on its administrative obligations. The Respondent anchors this submission on the decision of the Court in David Kemei v. Energy Regulatory Commission, Industrial Court Cause Number 1492 of 2011.
118. Damages are not awardable for unlawful termination. The Respondent was not privy to the loan transaction between the Claimant and his bank, and cannot be called upon to clear his loan arrears and penalties. The claim for annual leave days, has not specifically been proved. The Respondent urges the Court to throw out the Claim, with costs.



119. The issues are: -
- a. whether some of the remedies sought by the Claimant are practicable;
  - b. whether his contract of employment was terminated fairly, through the mandated and properly constituted Disciplinary Committee;
  - c. whether termination was founded on valid reason[s]; and,
  - d. what remedies if any, are merited.

**The Court Finds: -**

120. In his Documents filed in Court on 7<sup>th</sup> May 2019, at printed page 65 and handwritten page 86, the Claimant exhibits an Offer of Appointment.
121. The letter is undated and unsigned. It refers to a job application made by the addressee, dated 4<sup>th</sup> July 2008. It is not clear what purpose this letter was intended to serve, in the proceedings.
122. On 2<sup>nd</sup> April 2007, the Respondent wrote to the Claimant, through E.N. Gicheru Karanja, Personnel and Training Manager, informing him that he had been confirmed in permanent and pensionable establishment, with effect from 10<sup>th</sup> February 2005.
123. The Court has not traced the letter which appointed the Claimant, on 10<sup>th</sup> February 2005, in his bundle of documents.
124. On 31<sup>st</sup> March 2009, the Respondent issued him a letter promoting him to Chief Public Relations Officer, job group K5 with effect from 20<sup>th</sup> March 2009.
125. By the time he was suspended on 13<sup>th</sup> November 2018, his designation is indicated as Chief Corporate Affairs and Communication. His pay slips for July 2018, and February 2019, describe him as the Chief Corporate Affairs and Communication.
126. His Amended Statement of Claim is not clear, concerning the various job titles held by him at the Respondent.
127. Paragraph 3 states that at all material times, the Claimant was employed by the Respondent, on a gross monthly salary of Kshs. 254,040.
128. Paragraph 4 refers to the letter of confirmation into permanent and pensionable establishment, vide the letter dated 2<sup>nd</sup> April 2007.
129. He pleads at paragraph 5 that he served as Manager, Marketing and Communication and Head of Department/ Head of Corporate Affairs and Communication Department.
130. The Claimant was dismissed by the Respondent through a letter dated 13<sup>th</sup> June 2019. The letter refers to the Claimant's appearance before the Staff Disciplinary and Advisory Committee [SDAC], for hearing, on 17<sup>th</sup> May 2019 and 3<sup>rd</sup> June 2019. It refers to the Claimant as Head of Department, stating that the position required the highest level of integrity, which the Claimant did not demonstrate.
131. The reasons to justify dismissal are stated in the letter to include: -
- I. Although you denied having received any bribe from Wilberforce Akidiva Mwenesi of Blue Media Images Limited, you were not able to explain the reason you met the representatives of the company [i.e. Mwenesi and Katiku] outside the Hospital, when the procurement process of tender No.122/10/18-19 was ongoing, neither did you seek authority from the Chief



Executive Officer to engage with the representatives in the manner in which you did. Your interaction with the service provider, prior to the award of the tender is/ was inappropriate.

- II. You admitted to having met the service provider five [5] times out of which two [2], were outside the Hospital. One at Upper Hill, behind Equity Bank, and the other one on Moi Avenue [MKU] at the City Centre.
  - III. There is high probability that money was given out to facilitate processing of the LSO No. 05428 dated 26<sup>th</sup> October 2018 as evidenced by the partial refund of the same, when the deal went sour.
  - IV. You knowingly and unapologetically violated the Public and Asset Disposal Act 2005. This was confirmed by your admission that you had done the same in the previous tenders. Your conduct points to loss of confidence and trust on your part.
  - V. There were clear instructions from the Supply Chain Management on the execution of the LSO indicated on the introductory letter from KMPDB which instructions you violated. You indeed approved the procurement and issuance of the LSO, and later at the tail end of the process, withdrew the same, vide note dated 29<sup>th</sup> October 2018, pointing to a possible collusion to solicit bribe, thereby putting your integrity into disrepute.
132. The Claimant was advised of his right of appeal. He wrote a letter of appeal dated 3<sup>rd</sup> July 201, addressed to the Chairman, Human Resource Committee of the Board. The Claimant pleads that the Respondent did not acknowledge receipt of his appeal and the Respondent did not communicate the outcome of the appeal to him. He however learnt that his appeal had been dismissed, when he visited the Respondent's offices, for his half-monthly salary.

#### **A. Impracticable/unsupported remedies.**

133. Some of the prayers sought by the Claimant, 5 years after he left employment, are clearly not practicable.
134. Prayer [a] [i], is that a permanent injunction is granted, restraining the Respondent, its servants, employees or anybody else whatsoever, from advertising and or recruiting another employee to perform the duties of Head of Corporate Affairs and Communication, also known as Manager, Marketing and Communication / Head of Marketing and Communication also known as Manager, Corporate Affairs and Communication, Job Group KNH 5.
135. There was no order of temporary injunction granted by the Court, preserving the positions subject matter of the prayer for permanent injunction, pending the finalization of the dispute.
136. In its ruling on 8<sup>th</sup> January 2020, the Court stated that the Claimant held the position of Chief Public Relations Officer. He did not hold the position of Head of Marketing and Communication.
137. The position of Head of Marketing and Communication in job group K3 [Q] was advertised and its filling given a go-ahead by the Court, in its ruling dated 8<sup>th</sup> January 2020.
138. The Claimant has not established that there is a different designation of Head of Marketing and Communication, also known as Manager, Corporate Affairs and Communication, in job group K5, other than the one that was advertised by the Respondent, subject matter of the Court's ruling dated 8<sup>th</sup> January 2020.



139. The Court does not think that the Respondent retains two Heads of Marketing and Communication, also known as Manager Corporate Affairs and Marketing, and prayer [a] [i] of the Amended Statement of Claim is impracticable.
140. Prayer [b] resembles prayer [a] [i]. It seeks an order of permanent injunction, restraining the Respondent, its servants, employees or anybody else whatsoever from advertising, and /or recruiting another employee to perform the duties of Manager, Marketing and Communications and Head of Corporate Affairs and Communication.
141. The only difference between prayer [a] and [b] is that the former refers expressly to the position/s as falling in job group K5, while the latter, omits the job group.
142. For the same reasons, the Court finds prayer [b] impracticable. The Court was clear in its ruling that its orders preserved the position of Chief Public Relations Officer, not that of Head of Marketing and Communication.
143. Prayer [c] urges the Court to grant an order to compel the Respondent to immediately lift the Claimant's suspension, and allow the Claimant to continue performing his duties.
144. The Claimant was suspended on 13<sup>th</sup> November 2018. He was advised in the letter of dismissal dated 13<sup>th</sup> June 2019, that, " [i] the suspension hitherto imposed on you, with effect from 13<sup>th</sup> November 2018, should be lifted without loss of salary withheld during the period of suspension. [ii] You should be and are hereby dismissed from the service with effect from the date of this letter on account of gross misconduct and loss of trust."
145. Suspension was therefore lifted at the time of dismissal. It is not practicable for the Court to order that suspension is lifted again. It was lifted by the Respondent, and the Claimant dismissed from service, way back on 13<sup>th</sup> June 2019.
146. The second limb to prayer [c] alludes to the remedy of reinstatement, without expressly using the term reinstatement. The Claimant prays that he is allowed to continue performing his duties. This second limb to prayer [c], without the prayer for lifting of suspension, is sustainable.
147. Prayer [d] seeks an order barring the Respondent from subjecting the Claimant to a Disciplinary Committee, pending investigations by the Directorate of Criminal Investigations.
148. The disciplinary proceedings took place. Whether the Disciplinary Committee was clothed with jurisdiction; impartial or partial; are matters to be determined by the Court, but the Respondent cannot be barred from undertaking an exercise, which is well in the past.
149. It is also noted that the matter was reported to the Police. The Claimant himself told the Court that he reported the matter to the Directorate of Criminal Investigations, but did not clarify to the Court when he gave evidence, what became of his report; whether Police investigated the matter in full; whether there were prosecutions; or how the criminal report was closed. It is 5 years after the report to the Police was made.
150. Prayer [d] of the Amended Claim is similarly impracticable, disciplinary proceedings having been held and closed, culminating in the dismissal of the Claimant.
151. Prayer e[ii] of the Amended Statement of Claim is unreasonable and not based on the evidence. The Claimant prays that the Respondent is compelled to pay penalties on his bank loan, owing to the National Bank of Kenya, at the Kshs. 2.8 million, as of March 2021.



152. There is no evidence on record, showing that the Respondent was privy to any loan agreement between the Claimant and his bank. There was no loan agreement exhibited by the Claimant, creating any legal obligation on the Respondent, to pay the Claimant's loan balances, interests or penalties. The prayer is unreasonable and unsupported by evidence.
153. The Court rejects from the outset, prayers [a] [i], [b] [c, on lifting of suspension] and e[ii] of the Amended Statement of Claim.
154. Prayer [a] [ii] seeks a declaratory order that termination is null and void. Prayer [a] [iii] is that the Court declares that the decision of the Respondent, to uphold the decision of the Management Staff Disciplinary Committee unreasonable, null and void.
155. The two prayers are merged, the issue being whether, the Court should declare termination of the Claimant's contract by the Respondent, unfair and unlawful.
156. Other outstanding prayers are [d] on payment of salary arrears to the Claimant, as at March 2021, computed at Kshs. 4,255,000; prayer e[iii] on terminal benefits; interest; costs; and any other suitable orders. The separate prayer for unutilized annual leave days at Kshs. 387,000 can be dealt with under the prayer for terminal benefits. There is no reason why it is pleaded separately.
157. The result is that the prayers the Court proposes to deal with are: -
- a. Declaration that termination was unfair and unlawful.
  - b. Reinstatement or, re-employment.
  - c. Salary arrears and other benefits as at March 2021, computed at Kshs. 4,255,000.
  - d. Terminal benefits inclusive of outstanding annual leave.
  - e. Costs and Interest.
  - f. Any other suitable order.

## **B. Procedural Fairness.**

158. The main contention in the view of the Court, with regard to procedure, is whether the Claimant was heard, and a decision made against him, through the properly mandated Disciplinary Committee. But beyond the mandate of the Disciplinary Committee, there were other notable procedural concerns.
159. There is no doubt that he was notified of the allegations against him, through the letter of suspension, dated 13<sup>th</sup> November 2018. The allegations regarding bribery and sexual harassment of Katiku, were elaborately communicated through the letter of suspension.
160. The Claimant was advised that during suspension, he would be paid half basic monthly, house and outpatient medical allowances.
161. He was informed that the Respondent was contemplating severe disciplinary action against him, including dismissal from service.
162. He was in the meantime, asked to show cause why, the intended disciplinary action against him, should not be taken. He was to do so, within 7 days.



163. He wrote a long, 18-page response, dated 28<sup>th</sup> December 2018. He responded to all the charges, and all statements recorded by persons who were alleged to be witnesses against him, including the key accusers, Mwenesi and Katiku.
164. He had earlier requested to be supplied with relevant documents, through his letter dated 14<sup>th</sup> November 2018.
165. He confirmed in his letter dated 20<sup>th</sup> December 2018 to the Respondent, that he was supplied with witness statements, but not all the evidence adduced by his accusers.
166. He complained that he was not supplied a letter from the CEO KMPDB, which requested the Respondent to approve advertisement on KMPDB Directory; professional opinion on the said procurement; and minutes of the meeting held in the CEO's office, chaired by the CEO Dr. Mutie, attended by the Claimant's accusers.
167. He was invited through the letter dated 25<sup>th</sup> April 2019, for disciplinary hearing to take place on 22<sup>nd</sup> May 2019. Hearing was rescheduled to 3<sup>rd</sup> June 2019, through a second letter of invitation, dated 23<sup>rd</sup> May 2019.
168. He was availed the Respondent's Terms and Conditions of Service 2010-2011, which would suggest that this was the human resource instrument applicable in the disciplinary hearing.  
.
169. The hearing would take place before the Staff Disciplinary and Advisory Committee [SDAC]. He was advised to take along, another Employee or a Representative from his Trade Union.
170. The letter of suspension and the letter inviting the Claimant for disciplinary hearing, did not specify whether the Respondent was proceeding under the Terms and Conditions of Service, Revised 2010-2011, or the Human Resource Manual 2019.
171. The correct procedure would have been the one prescribed under the Terms and Conditions of Service 2010-2011.
172. The Court notes that in his evidence on cross-examination, Carrilus Ochieng' for the Respondent, told the Court that disciplinary proceedings took place in May-June 2019. The Human Resource Manual was a work in progress, and according to Ochieng,' was approved in September 2019. It cannot therefore have applied to the Claimant, in May-June 2019. It is noted that the Respondent supplied the Claimant with a copy of the Terms and Conditions of Service, in preparation of the hearing.
173. Part VI of the Terms and Conditions of Service deals with authority to handle disciplinary cases.
174. The CEO is mandated to institute proceedings against an Employee, on the grounds that breach of discipline has been committed.
175. Hearing is conducted by three different Disciplinary Committees. The three Committees are in general known as Staff Disciplinary and Advisory Committees. They are: -
  - a. Board of Management Staff Disciplinary and Advisory Committee [BOMSDAC]. This Committee deals with cases of discipline, involving Directors, Deputy Directors and Chief Managers [Management Staff]. This Committee also hears appeals from the Hospital Management Staff Disciplinary and Advisory Committee [HMSDAC]. The BOMSDAC is chaired by a member of the Board, and includes the following others: one Board member; one representative of the Permanent Secretary Ministry of Health; one representative of the



Permanent Secretary Ministry of Finance; Principal, College of Health Sciences, University of Nairobi; Director, Kenya Medical Training College; one representative Inspectorate of State Corporations; and the CEO. The Respondent's Director of Clinical Services and Director of Human Resources, are supposed to attend the proceedings of the BOMSDAC, presumably as its secretariat.

- b. The second Committee is the Hospital Management Staff Disciplinary and Advisory Committee [HMSDAC]. This Committee has jurisdiction in disciplinary cases involving professional and general staff. It also handles appeals from the Departmental Disciplinary and Advisory Committee [DDAC]. It is chaired by Director Human Resource and Operations. It is made up of Director Clinical Services; Director Finance, Planning and Development; Deputy Director Nursing Services; Deputy Director Medical Services; Chief Manager, Finance; Chief Manager, Internal Audit; Chief Manager, Supplies and Procurement; Chief Manager, Corporate Affairs; and Chief Manager, Human Resource. The Chief Manager Human Resource acts as the secretary to HMSDAC.
  - c. The third and last Committee is the Departmental Staff Disciplinary and Advisory Committee[s] [DSDAC]. It is not specified in the Terms and Conditions of Service, which Employees are heard by this Committee, particularly because the HMSDAC, is said to cover professional and general staff. It is specified however, that the Committee is chaired by respective Heads of Departments [Deputy Directors and Chief Managers].
176. The letter which invited the Claimant to the Staff Disciplinary and Advisory Committee, did so without specifying which of the three Staff Disciplinary and Advisory Committees, under Part V1 of the Terms and Conditions of Service, the Claimant was to appear before.
  177. Under the Terms and Conditions of Service of the Respondent, there is no single Disciplinary Committee, known as Staff Disciplinary and Advisory Committee [SDAC]; there are three different Committees, in general, known as Staff Disciplinary and Advisory Committees.
  178. The letter of invitation named 9 members of the Disciplinary Committee. Their respective designations are not disclosed. The Committee was chaired by Carylus Odiango. Other members were Dr. Julius Ogato, Mrs. J. Mugambi, Dr. K. Ondele, Dr. P. Etau, Dr. T. Menge, Calvin Nyachoti, M. Kihuga and Elphas Choge.
  179. The Claimant, as shown in his pay slips for July 2018 and February 2019, was the Chief, Corporate Affairs and Communication. The letter of dismissal confirmed that the Claimant was a Head of Department. The Respondent attempted to explain the various titles it ascribed to the Claimant, on the ground that it had not issued letters appointing the Claimant to the substantive positions he alleges to have served in. It was also submitted that the Court preserved the position of Chief Public Relations Officer. These explanations do not justify why, the Respondent referred to the Claimant as Chief, Corporate Affairs and Communication in the pay slips, and Head of Department in the letter of dismissal. There was no letter exhibited by the Respondent appointing the Claimant in any acting capacity. The finding of the Court in an interlocutory application, on the Claimant's job title, was not conclusive. The Court is mandated to make a determination upon full hearing, and evaluation of evidence.
  180. Section 10 of the *Employment Act* places an obligation on Employers to give clear details of the employment contract. The Respondent was not clear in its evidence on the Claimant's job title and the Court can only uphold the designation given in the pay slips, and in the letter of dismissal. He was Chief, Corporate Affairs and Communication, and Head of Department.



181. The Staff Disciplinary and Advisory Committee with jurisdiction over him, was the first Committee, the BOMSDAC.
182. He was not to be heard by HMSDAC or the DSDAC. He would have been a member of the second Committee HMSDAC given his job title as indicated in his pay slips, and obviously not subject to be heard by the same Committee. He was to be heard by BOMSDAC as a Chief Manager.
183. None of the 9 persons named in the invitation letter was identified as a Board member. None was identified as a representative of the Permanent Secretary in the Ministry of Health, or representative of the Permanent Secretary in the Ministry of Finance. The Court was not told which of the 9 persons, was the Principal, College of Health Sciences University of Nairobi, Director Kenya Medical Training College, representative of the Inspectorate of State Corporations, or the CEO.
184. Procedure was fundamentally flawed, in that the Committee of 9 persons who heard the Claimant, did not comprise BOMSDAC. Administrators must obey their own regulations. Where they constitute Disciplinary Committees, they must do so in conformity with the law and the applicable human resource instruments. Without adherence to the Terms and Conditions of Service, the Disciplinary Committee constituted by the Respondent, was a collection of persons with no power at all, over the Claimant.
185. The submission by the Claimant that he was not heard before the properly mandated Disciplinary Committee, carries considerable weight, and is sustained. In Supreme Court of Kenya decision, Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & 2 Others [2012]; Court of Appeal of Kenya in Civil Appeal No. 64 of 2016, Lemita Ole Lemein; and the seminal decision, Owners of Motor Vehicle 'Lillian S' v. Caltex Limited [1989] E.A. 1, the Courts established that jurisdiction is everything. A Court or tribunal cannot arrogate itself jurisdiction. Jurisdiction flows from *the Constitution*, the Law or other constitutive or regulatory instruments. The Respondent's governing Terms and Conditions of Service mandates BOMSDAC to hear the Claimant. He was heard by a collection of individuals, with no disciplinary mandate over him.
186. A decision taken without jurisdiction is deemed null and void. This was emphasized by the High Court in Joseph Oginga Onyoni & 2 Others v. The Attorney-General & 2 Others [2016] e-KLR. In the English case Macfoy v. United African Co. Limited [1961] 3 ALL ER. 1169, Lord Denning took a very grim view of such decisions, stating:

“ If an act is void, it is a nullity in law. It is not only bad, but incurably bad. There is no need for an order of the Court, to set it aside. It is automatically null and void, without much ado, though it is sometimes convenient, to have the Court declare it to be so.”
187. The Claimant complains that the Disciplinary Committee, not only lacked jurisdiction; it was composed of conflicted individuals. Members of a Disciplinary Committee must be impartial, and need credibility to be able to run the disciplinary proceedings fairly. Parties had been before the Court, which directed that the Disciplinary Panel, be composed of impartial individuals.
188. The Chair Carylus Odiango was Head of Security and worked with Human Resource on investigations against the Claimant. Calvin Nyachoti had communicated to the Claimant on the subject matter, leading to the disciplinary hearing as shown at page 149-150 of the Claimant's documents. Another Officer Michael Kihuga had been involved in the subject matter prior to the hearing. Officers connected with the matters subject of the investigations and disciplinary action taken against the Claimant, ought not to have sat in the Disciplinary Committee.



189. The Claimant told the Court without much protestation from the Respondent, that when he raised this fundamental issue on potential witnesses appearing as prosecutors, judges and executioners, he was rebuffed by the Respondent, and told that sideshows would not take him very far. He was told that a decision had already been made. The Committee, while condemning the Claimant from the outset based on the allegations made against him by Mwenesi and Katiku, offered him a strange piece of advice: that his fate at the disciplinary hearing was sealed, and that he could only sue Mwenesi for defamation.
190. In *George Mburugu Ikiara v. National Police Service Commission* [2021] e-KLR, the Court held that Administrators have an obligation under the *Fair Administrative Action Act*, to act reasonably, without bias or suspicion, and in good faith. Administrators must create an atmosphere that enables fair and objective hearing, without displaying a condescending attitude to the person subject of the administrative action. Persons appearing before Administrators, must not be prejudged. The language employed by Administrators in conduct of the proceedings, must be temperate. Administrators must on all occasions exhibit a high sense of judicial comportment. Lack of judicial comportment, and application of intemperate language, compromises a fair hearing, as held in *London Borough of Southwark v. Kofi-Adu* [2006] [EWCA Civ. 2008].
191. Whereas the Claimant was advised on his procedural right to be accompanied to the disciplinary hearing, by a colleague of his choice, or a representative of his Trade Union, in accordance with Section 41 of the *Employment Act*, he was not given adequate facility to make his representations. He told the Court that his colleague from the Trade Union was not allowed to talk. He was told that his role was to listen. He was gagged throughout the hearing. Section 41 [2] of the *Employment Act* requires an Employer to hear and consider any representations made by the Employee, as well as those of the person accompanying the Employee.
192. The Court is satisfied that the Disciplinary Committee not only lacked jurisdiction; its members were not impartial. They prejudged the Claimant, and were intemperate in their conduct of the proceedings. The Respondent mal-administered its own disciplinary procedures to the detriment of the Claimant. Some of the members of the Disciplinary Committee, were potential witnesses, and not the proper persons to judge the Claimant.
193. Another aspect of the disciplinary hearing which did not assist the Respondent, in demonstrating that it met the legal and constitutional standards of fair hearing, is that the persons who recorded statements, making very grave accusations against the Claimant, concerning bribery and sexual harassment, did not appear at the hearing, and affirm their accusations. They made bare statements, but when the moment came to substantiate, they went missing.
194. The Disciplinary Committee had a responsibility to ensure that the persons who made allegations against the Claimant, in particular Mwenesi and Katiku, availed themselves before the Disciplinary Committee, and were confronted by the Claimant eyeball to eyeball.
195. In *Court of Appeal [Nyeri] Civil Appeal No. 214 of 2018, British Army Training Unit Kenya v. Joseph Kairu Mutahi*, the Respondent/ Employee had been accused of sexual harassment. The witnesses had made statements, but did not appear as witnesses for the Employer at the hearing, and were therefore not cross-examined by the Employee. The Court of Appeal held:

“It is clear that the Respondent [Employee] was not given the opportunity to question his accusers at any point. The veracity of the statements used to terminate his long career was never tested. There was no proof that the said statements had been made by actual persons who had genuine grievances against him. The possibility that the entire process



could have been choreographed by malicious persons, who wanted the Respondent sacked, was therefore, not ruled out. ‘

196. This was a fundamental procedural misstep, that prejudiced the Claimant. He was accused of bribery and sexual harassment, but his accusers were not presented at the hearing.
197. The Claimant submitted that the Respondent, a public entity, is also bound by the Human Resource Policies and Procedures Manual for the Public Service, 2016.
198. This instrument applies to the National and County Governments, and other Government Agencies. The Respondent is a Government entity, bound by the instrument. The instrument provides the basis for human resource policies and regulations in the wider Public Service. It is a reference point for the entire Public Service. The instrument requires under Section J.4 that a Public Officer shall carry out his/ her duties in accordance with the law, and shall not violate the rights and freedoms of any person, enshrined in Chapter 4 of *the Constitution*. Section J.19 binds Public Officers at all times, to carry out their duties with impartiality and objectivity, in accordance with Articles 10, 27, 73[2] [b] and 232 of *the Constitution*.
199. The Respondent and the collection of officers it entrusted the disciplinary proceedings over the Claimant, did not pay heed to the Public Service Human Resource Manual, which encapsulates values and principles of public service, under Article 232 of *the Constitution*.
200. The last ground with regard to procedure relates to appeal. The Claimant wrote a letter of appeal, dated 3<sup>rd</sup> July 2019. It was addressed to the Chairman, Human Resource Committee of the Board. Among his grounds was that the Disciplinary Committee which heard him, did not have the requisite mandate.
201. Part 1V clause 2 [c] [iii] requires that appeals from BOMSDAC, are forwarded to the full Board of Management.
202. There is no clear evidence when, or if, the full Board of Management met, and heard the Claimant’s appeal.
203. The Claimant’s position is that there was no communication from the Respondent for one year, from the time he lodged his appeal. He was not called and given a hearing. He was not told that the full Board of Management would meet and deliberate on his appeal. He learnt of the outcome by chance.
204. The Terms and Conditions of Service are not detailed on how the appeal lodged by an Officer, once presented to the Board of Management, is to be dealt with. The timelines are not clear, and it is not made clear, whether the appellant should be granted a personal hearing.
205. The Board of Management ought to have been guided by the *Fair Administrative Action Act*, 2015 in dealing with the appeal.
206. Section 4 [1] of the Act states that every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair. Where the administrative action is likely to adversely affect the rights or freedoms of any person, the administrator shall give the person affected by the decision an opportunity to be heard and make representations.
207. Section 4[4] of the Act amplifies the right of hearing, affirming that the administrator shall accord the person against whom administrative action is taken, an opportunity to attend the proceedings, and an opportunity to be heard.
208. The right of fair hearing is not restricted to the primary disciplinary hearing; it must be extended on appeal against an administrative decision. The nature of the hearing is not a paper hearing; it is



a personal hearing, unless the administrator can point to any other written law, empowering him to follow a different procedure. That other procedure must in any event, conform to Article 47 of *the Constitution*. The Claimant ought to have been personally invited and heard, before the full Board of Management on appeal, particularly because he was raising substantial ground on appeal, including on the jurisdiction of the Committee which heard him. Delaying his appeal, and keeping him in darkness, for a year, was in violation of his right to fair administrative action. It equally infringed his Article 41 rights.

209. Section 45 [5] of the *Employment Act* states that in determining, if an Employer acted justly and equitably in terminating an Employee's contract, the Court [or Labour Officer] shall consider the procedure adopted by the Employer in reaching the decision, and in handling of any appeal against the decision. Handling of any appeal, carries the same test of procedural fairness, as the primary hearing. An Employer cannot be cavalier in its conduct of appellate proceedings as the Respondent was, after receiving the Claimant's appeal.
210. The Court is satisfied that the procedure adopted by the Respondent, leading to dismissal of the Claimant, was not in conformity with the minimum statutory and constitutional standards of procedural fairness, under the *Employment Act*, the *Fair Administrative Action Act*, the Terms and Conditions of Service of the Respondent revised in 2010-2011, the core Public Service Human Resource Policies and Procedures Manual 2016, and *the Constitution* of Kenya.

### **C.Validity of reason[s].**

211. The letter of dismissal dated 13<sup>th</sup> June 2019 cited gross misconduct and loss of trust, as the reasons justifying dismissal decision.
212. Details of gross misconduct and loss of trust, centred on allegations of bribery against the Claimant.
213. Although there were allegations made elsewhere, that the Claimant sexually harassed one of the bribe givers, a lady named Katiku, the letter of dismissal does not mention sexual harassment, as one of the grounds justifying dismissal.
214. The allegation that the Claimant negotiated a bribery in the sum of Kshs. 283,000 representing 15% of the tender value, and that he received Kshs. 50,000 as down payment; the allegation that he refunded Kshs. 47,000 to the bribe givers after the deal went sour, was not established.
215. The letter of dismissal reduced this allegation to one where there was a high probability, that money was given out to facilitate processing of LSO No. 05428. There was no finding on the dark allegation of sexual harassment made against the Claimant. The Respondent just held onto straws, in form of generalized conclusions about lack of integrity, on the part of the Claimant.
216. Previously and in the processes leading to dismissal, the Respondent was unequivocal that the Claimant had received a bribe from Mwenesi and Katiku, and that in the process, he sexually harassed Katiku.
217. As observed by the Court in dealing with procedural fairness, Mwenesi and Katiku did not attend the disciplinary hearing, and there was no evidence therefore, to support their very serious allegations against the Claimant, on bribery and sexual harassment.
218. The Claimant explained that his office was open space, with other staffers within. Katiku was always in the company of her colleague Mwenesi, except on one occasion, when she asked the Claimant to sign a space order.



219. The allegation of sexual harassment by Katiku, appears to have been a well-orchestrated move, to tarnish the Claimant's reputation as a steadfast public servant, who had declined the invitation by some top management officers at the Respondent, and tenderpreneurs from Blue Media Limited, to sidestep procurement laws and award tender for media advertisement to Blue Media Limited at any cost.
220. Why did Katiku not avail herself at the hearing to establish sexual harassment, and why was the Respondent silent on the allegation, in the dismissal letter?
221. Sexual harassment under Section J.23 of the Public Service Human Resource Manual, is prohibited. It has been defined to include making a request or exerting pressure for sexual activity or favours; making intentional or careless physical contact that is sexual in nature; and making gestures, noise, jokes or comments including innuendos, regarding another person's sexuality. This definition of sexual harassment in the Manual, tallies with the definition under Section 6[1] of the *Employment Act*, and in the acclaimed Indian Supreme Court decision, *Vishaka & Others v. State of Rajasthan*, AIR [1997] SC 3011. Katiku did not establish that the Claimant engaged in any direct or indirect, verbal or non-verbal forms of sexual harassment. She just made an allegation, to go with the allegation of bribery against the Claimant, who was viewed by her Employer Blue Media Limited, as a stumbling block, in award and conclusion of the tender. There is no communication between her and the Claimant, broaching the subject of her sexual harassment. Her sexuality was weaponized, to put the Claimant's public service career to the sword. Her colleague Mwenesi, rather than herself, appears to have been the one to constantly make allegations of sexual harassment against the Claimant. He told the Claimant: "unataka msichana na pesa [you want our money and our lady]."
222. There is evidence that the top Managers at the Respondent, wished to push through the flawed tender to Blue Media Limited, in complete disregard of Executive Order No. 6 and Treasury Circular No. 20/2015, which bound all Government Ministries and State Agencies, to ensure that all their institutional advertisements are carried out by the Government Advertising Agency, or with exemption from the Government. The Executive Order and the Circular, had been dispersed widely to the Managers at the Respondent through a memo issued by Rose Njoroge. Instructions to comply were spelt out clearly by the Respondent to all Staff. It was strange that the Respondent's top echelons, put so much pressure on the Claimant, to go against the Respondent's own strict instructions issued to staff, concerning the Executive Order and the Circular.
223. The Claimant's problem with the Respondent, was that he insisted on the Respondent complying with the Executive Order and Treasury Circular. Blue Media had tendered in August 2018, to publicize the Respondent in the Kenya Medical Practitioners and Dentist Board Magazine. The Respondent is a public entity, which was bound by the Executive Order and the Treasury Circular.
224. The Respondent alleged that the tender had been approved by the Director Clinical Services and forwarded to the Deputy Director, Supply Chain Management, where direct procurement was recommended.
225. There was pressure exerted by Mwenesi from Blue Media and interested top Managers, on the Claimant's department to sign and release LSO without compliance to procurement regulations. The LSO was eventually signed by the Claimant's assistant Luke Kung'u, while the Claimant was out of office. Upon his return, the Claimant reviewed the LSO, and to the consternation of Mwenesi and his colleagues at the Respondent, wrote a memo dated 31<sup>st</sup> May 2016, insisting on approval or exemption, under the Executive Order and Treasury Circular.
226. It is at this point that Mwenesi made the allegation that the Claimant changed heart after the bribery deal went sour, leading to the alleged refund of the bribe down payment by the Claimant, to Mwenesi.



227. The allegations concerning bribery were subject matter of criminal investigations by the CID. In fact, the Claimant himself had brought the matter to the attention of the Police and the Respondent's own Security Office. The Claimant was not arrested or charged with the serious crime of corruption in public service. There was nothing more to the allegations by Mwenesi and Katiku, other than an attempt to compromise the Claimant's public service record, damage his reputation and employability, on account of the Claimant's spirited refusal to bend the rules, to advance tenderpreneurship.
228. There were WhatsApp messages attributed to Mwenesi, and allegedly sent to the Claimant on the subject, which were exhibited by the Respondent. The messages are one-way, from Mwenesi, with no record of responses from the alleged recipient. There is no message seen by the Court, where the Claimant solicits for any form of incentive, monetary or sexual, to discharge his role as a public servant. Mwenesi even exhibited some M-pesa message showing that he withdrew Kshs. 50,000 from an agent, on 26<sup>th</sup> October 2018, presumably to bribe the Claimant. There was no evidence of receipt or demand of any bribe by the Claimant.
229. Carrilus Ochieng' told the Court on cross-examination that KMPDB, is not a department of the Respondent, and that the Claimant held that procurement could go on, subject to the applicable Government regulations.
230. One of the messages attributed to Mwenesi, dated 3<sup>rd</sup> November 2018, states, verbatim: -  
 "...As indicated to u, we wudnt wish to deal with corrupt government officers like u. People who want to con the government of Kenya like u.  
 People who wastes people times. We will expose yu with ua dirty tricks n delays so that u can eat some money. Send me 3 k plus interest on the cash. We do shylock business on our side business... Ithae, am disappointed in u. U created issues... u bring in the law, so that u can syphone money from us... u will pay thru the roof...unataka pesa, unataka msichana...Ur very glutton"
231. Mwenesi sounds quite angry with the Claimant in his sheng' messages, if it is true that he authored these messages. He acknowledges that the Claimant had insisted on sticking to the requirements of procurement law, which would suggest that Mwenesi was aware that the Claimant had declined to execute and release the LSO, against the Executive Order and the Treasury Circular. And why would the Respondent, a public entity, be procuring services from a self-confessed shylock?
232. Not much weight however, is to be given to these electronic messages attributed to Mwenesi, in the absence of his oral evidence at any forum where the facts were tried- the disciplinary hearing and in the proceedings before this Court.
233. The Claimant took the appropriate action, upon receiving these threatening messages from Mwenesi. He reported the incident at Kabete Police, and to Head of Safety and Security at the Respondent Hospital, Manasseh. The Claimant was referred to Kilimani Police Station, then to DCI. The DCI in the end advised the Claimant that the Respondent's Safety and Security Department had initiated investigations, and no further Police intervention was necessary. There is no evidence that the Respondent conclusively investigated these messages, and took the necessary action against the bribery recipient or the givers. Suffice it to say that Mwenesi later confronted the Claimant, and the two agreed to proceed together to Kilimani Police Station, only for Mwenesi to detour and not avail himself at the said Police Station, insisting later that he would report the Claimant to a Police Station of his choice- Buru Police Station.
234. There is evidence that Mwenesi was in direct communication with Dr. Peter Masinde, who as of 24<sup>th</sup> October 2018 was the Director Clinical Services and acting CEO of the Respondent, and who had



approved direct procurement for the publishing of the advertisement in the Medical Practitioners' Directory. The same day when Mwenesi was threatening to report the Claimant to the Police at Buru, Dr. Masinde curiously called the Claimant, enquiring why he had not facilitated advertisement in the KMPDB Directory. It was also Dr. Masinde who called a meeting in the CEO's office, where Mwenesi and Katiku were invited and repeated accusations of bribery and sexual harassment against the Claimant. Mwenesi even threatened to expose Claimant to a social media platform, going by the name of Kilimani Mums. He threatened further, in the midst of the top Managers at the Respondent, to escalate the grievance against the Claimant and by extension the Respondent, to the EACC. At the time of the meeting, the Claimant had already reported the matter to Kilimani Police and the Respondent's Security and Safety Department.

235. Bribery and sexual harassment allegations against a public officer, are not accusations that a public service employer, should treat with a cavalier attitude, as did the Respondent. If there was any truth in the allegations, the Respondent ought to have taken the lead, in having the Claimant reported to the Ethics and Anti- Corruption Commission. It is ironical that it was left to Mwenesi, to threaten that he would escalate the matter to EACC. The Respondent, a public entity, ought to have reported the matter to EACC, without waiting to be prompted by the man at the heart of the corruption allegations. There was no conceivable reason why no prosecution against the Claimant, under the *Anti-Corruption and Economic Crimes Act*, was taken or even contemplated. There is no conceivable reason why a matter that was reported to the Police and to the Respondent's Security and Safety Department, was not taken up by the authorised criminal justice agencies. Allegations of sexual harassment, when not pursued by the maker, or by the authority receiving the sexual harassment report, tend to result in the view that the allegations were fabrications, from their inception, created by their maker for reasons such as revenge, malice, anger, to ruin the character or career of the persons against whom the accusations are directed, or for financial gain.
236. There was some resonance, in the Claimant's prayer at the outset, for the aid of the Court, in putting in abeyance the administrative process, pending the conclusion of the investigations by the Police. Unfortunately, that endeavour was overtaken by events.
237. The Court is persuaded that there were no valid reasons, to justify dismissal. Evidence in support of the reasons advanced by the Respondent to justify dismissal, was derived by the Respondent from two individuals associated with Blue Media Limited, one who disclosed that his business was engaged in the murky, underworld business of shylocking. These individuals alleged that they had bribed the Claimant, and one of them, went as far as alleging that she was sexually harassed by the Claimant. None of them offered any evidence at the disciplinary hearing. None was called by the Respondent as witnesses, in the proceedings before the Court.
238. Dismissal was not founded on valid reasons.

#### **D . Remedies.**

239. It is declared that termination of the Claimant's contract by the Respondent, was unfair and unlawful.
240. The Claimant seeks the primary remedy of reinstatement. In the Court of Appeal decision, *Judicial Service Commission & Another v. Njora* [Civil Appeal 486 of 2019] [2021] KECA 366 [KLR] [7<sup>th</sup> May 2021] [Judgment], it was held that a public body that is subject to *the Constitution* and its statute, and which has been found to have been in breach of the law, and to have acted unlawfully, irrationally and disproportionately in dismissing an Employee, cannot escape the remedy of reinstatement.
241. The Respondent clearly acted unfairly, unlawfully and irrationally, by victimizing the Claimant, for his strong stand, in a clearly flawed procurement process. There were multiple procedural missteps, which



included lack of mandate in the Disciplinary Committee; tainted composition in the membership of the Disciplinary Committee; its lack of impartiality; and failure to present key witness including the movers of the bribery and sexual harassment allegations, Mwenesi and Katiku. There was no valid reason or reasons shown, to justify termination. Reinstatement would be merited, under the principles in the decision of the Court of Appeal cited above.

242. The decision to dismiss the Claimant from service was unreasonable as submitted by his Advocate, within the meaning of the Wednesbury Principle, as defined in the House of Lords decision, *CCSU v. the Minister for Civil Service*, 1985 1 AC 375:
- “ By irrationality, I mean what can now be referred as Wednesbury unreasonableness. It applies to a decision which is so outrageous in its defiance of logic or accepted moral standards, that no sensible person, who had applied his mind to the question to be decided, could have arrived at it.”
243. There is no doubt in the mind of the Court that the Respondent acted irrationally, unreasonably and unlawfully, in dismissing the Claimant, and cannot escape the remedy of reinstatement [or re-employment].
244. There is however a statutory bar to the grant of the remedy of reinstatement, under Section 12 [3] [vii] of this court’s constitutive Act, which is that the remedy is only valid, within 3 years of the date of dismissal.
245. The letter of dismissal is dated 13<sup>th</sup> June 2019. This is about 4 years ago. It is beyond the statutory limit of 3 years, allowed in grant of the remedy of reinstatement. The Claimant told the Court that he appealed, and learnt of the outcome dismissing his Appeal by chance, about one year from the date of its filing. This would suggest that the Appeal was dismissed in 2020, which would still take the effective date of dismissal, beyond the 3 years prescribed in grant of the remedy of reinstatement.
246. The Claimant appears to have held variously named roles at the time of dismissal. He sought to preserve the position of Manager, Marketing Communications / Head of Marketing and Communications, also known as Manager, Corporate Affairs and Communications.
247. His pay slips designated him Chief, Corporate Affairs and Communication.
248. The position that was preserved by the Court for the Claimant was Chief Public Relations Officer.
249. The Court allowed the Respondent to advertise and fill the position of Head of Marketing and Communication. The Court has offered the view elsewhere in this Judgment, that it is highly improbable that the Respondent retains two Heads of Communication.
250. The Claimant told the Court that there was restructuring and job groups and titles may have shifted.
251. He also told the Court that he executed a Performance Management contract with the Respondent, where he was referred to as Marketing and Communication Manager.
252. The Respondent accuses the Claimant of attempting to assign himself the role of Head of Communication Department, and submits correctly in the view of the Court, that it is a managerial prerogative, to create and designate job groups.
253. An order of reinstatement is meant to restore the Employee to the full contractual terms that were in place, at the time of termination. In the circumstances, it is the view of the Court that the order of reinstatement is not only statutory-barred, but would be impracticable, as the Claimant’s job title at the time he left, appears to have been imprecise or replete.



254. The remedy which recommends itself to the Court, is the remedy of re-engagement. As pointed out earlier, the Claimant does not explicitly pray for reinstatement; he asked the Court to be allowed to go back to work. He asked the Court to order that the Respondent re-employs him.
255. Re-engagement is workable. It is not encumbered through statutory limitation under the *Employment and Labour Relations Court Act*. It is not hampered by structural changes that may have taken place at the Respondent since the Claimant left employment. It accommodates changes that have taken place since he left employment, or those that would be necessary, in restoring his contract of employment. Re-engagement allows Parties to restore the employer-employee relationship, with such variations as may be necessary, to sustain the relationship.
256. Section 49 [3] [b] of the *Employment Act* avails the remedy of re-engagement, as an alternative to reinstatement. The Employee may be re-engaged in work comparable to that which he was employed prior to his dismissal, or to other reasonably suitable work, at the same salary scale.
257. The Respondent shall re-engage the Claimant in work comparable to that in which he worked immediately prior to termination, or other reasonably suitable work, at the same salary.
258. The Claimant prays for arrears of salary from the date of suspension to-date. The Court has considered that the Respondent is a public entity, and ultimately, any monetary award made in favour of the Claimant, shall be charged on public funds.
259. He has not rendered any service from the date he was suspended, and an award of arrears of salary, for services not rendered, would be disproportionate to the economic injury sustained by him on account of his loss of employment, and would be needlessly burdensome on public coffers.
260. In *Elizabeth Wakanyi Kibe v. Telkom Kenya Limited* [2014] e-KLR, the Court of Appeal, in endorsing the reasoning of the Industrial Court in Cause No. 379 of 2009, *D.K. Njagi Marete v. Teachers Service Commission*, held that employment remedies must be proportionate to the economic injuries suffered by the Employee. They are not aimed at unjust enrichment of aggrieved Employees.
261. The Claimant was however, in a valid contractual relationship with the Respondent, until the Respondent threw out his Appeal, after dismissal. He was receiving half his monthly basic salary from 13<sup>th</sup> November 2018, when he was suspended. In his letter of dismissal, the Respondent assured him that he would not lose his withheld salary. The Court was not given clear evidence on payment of withheld salary, up to and including the date the Claimant's appeal was declined.
262. He is granted withheld salary from the date of suspension, to the date his Appeal on dismissal, was declined by the Respondent.
263. The period from the date his Appeal was dismissed, to the date of re-engagement, shall be treated as a period of unpaid leave.
264. There shall be no loss of continuity in the years of service.
265. In alternative to re-employment, the Claimant prays for damages for unfair and unlawful termination, and terminal benefits.
266. He did not support the prayer for annual leave pay, of 81 days, at Kshs. 387,000. He did not specify in his evidence, when the 81 days of annual leave accrued. The prayer is declined. The Court is similarly not able to make out the exact nature of other terminal benefits claimed. The Claimant ought to have specified what terminal benefits he seeks. The prayer for terminal benefits is declined.



267. He had worked for over 13 years. He was a conscientious public servant who did not cause, or contribute to the circumstances, leading to termination of his service. His pay slip of February 2019, shows that he was 48 years, and expected to retire at the age of 60 years, in 2030. He had served for 13 years and expected to serve for another 12 years, when the Respondent ended his service arbitrarily. He does not appear to have informed the Court whether he mitigated loss of employment, by securing another job. The Respondent was not clear on any payments made on the Claimant at the end of his service.
268. The Court grants the alternative prayer for compensation for unfair and unlawful termination, equivalent of 12 months' gross salary, at Kshs. 254, 040 x 12 = Kshs. 3,048,480.
269. The Claimant shall indicate to the Respondent in writing, within 30 days of this Judgment, which of his alternative prayers he elects.
270. The Respondent to comply with the Judgment of the Court within another 30 days of receiving the Claimant's communication, in default the Claimant to pursue appropriate enforcement.
271. Costs to the Claimant.
272. Interest allowed at court rate, from the date of Judgment, till compliance in full.

**In Sum, It Is Ordered: -**

273. ...
- a. It is declared that termination of the Claimant's contract by the Respondent was unfair and unlawful.
  - b. The Respondent shall re-engage the Claimant to work comparable to that in which he worked, immediately prior to termination, or other reasonably suitable work, at the same salary level.
  - c. The Respondent shall pay to the Claimant withheld salary from the date of suspension, to the date his Appeal on dismissal, was declined by the Respondent.
  - d. The period from the date the Appeal was declined, to the date of re-engagement, shall be treated as a period of unpaid leave.
  - e. There shall be no loss of continuity in the years of service.
  - f. In the alternative to the remedy of re-engagement, the Respondent shall pay to the Claimant equivalent of 12 months' salary in compensation for unfair and unlawful termination, at Kshs. 3, 048, 480.
  - g. The Claimant shall indicate in writing to the Respondent, within 30 days of delivery of this Judgment, which of his two alternative prayers he elects.
  - h. The Respondent to comply in full with the Judgment of the Court within another 30 days of receiving the Claimant's communication, in default the Claimant to pursue appropriate enforcement.
  - i. Costs to the Claimant.
  - j. Interest allowed at court rate, from the date of Judgment till compliance in full.



DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 29<sup>TH</sup> DAY OF FEBRUARY 2024.

JAMES RIKA

JUDGE

