



**Njuguna v Embe Water and Sanitation Company Limited (Cause E015 of 2023) [2024] KEELRC 1039 (KLR) (18 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1039 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
CAUSE E015 OF 2023  
ON MAKAU, J  
APRIL 18, 2024**

**BETWEEN**

**DANIEL MUTUKU NJUGUNA ..... CLAIMANT**

**AND**

**EMBE WATER AND SANITATION COMPANY LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant was employed by the respondent as its General Manager under a three -years contract starting 20<sup>th</sup> April 2021. His gross pay was Kshs.116,730 per month. He worked until 14<sup>th</sup> December 2023 when he was served with a letter sending him to a compulsory leave for 90 days to pave the way for investigations into his conduct and engagement with the Board.
2. Subsequently, he was served with a show cause letter dated 6<sup>th</sup> March 2023 accusing him of several acts of misconduct. The process culminated in the termination of his employment vide a letter dated 12<sup>th</sup> April 2023 which offered him three months' salary in lieu of notice, gratuity and a certificate of service.
3. The claimant was aggrieved and brought this suit alleging that his services were unfairly and unlawfully terminated and sought the following reliefs-
  - a. A declaration that the claimant's dismissal disguised as a termination of contract was illegal and unlawful in procedure and substance.
  - b. An order for the Respondent to pay the claimant his terminal dues and compensatory damages as pleaded and tabulated in paragraph 18 of the claim.
  - c. The Respondent do pay the claimant interest on the amount claimed herein.
  - d. The Respondent do pay the claimant's costs of this case plus interest thereon.



4. The respondent filed a Response to the claim on 7<sup>th</sup> July 2023 and amended it on 21<sup>st</sup> July 2023. In brief it admitted the employment relationship with the claimant but denied the alleged unfair termination. It averred that the claimant committed gross misconduct which justified summary dismissal. Further, a fair procedure was followed before the termination. Consequently, it averred that the claimant was not entitled to any terminal benefits or compensatory damages as prayed.

## **Evidence**

5. The claimant testified as CW1. He contended that his three years contract was terminated prematurely on 5<sup>th</sup> April 2023. He adopted his written statement dated 24<sup>th</sup> May 2023 as his evidence in chief. He also produced 15 documents as exhibits.
6. He testified that the accusations of incompetence which led to his dismissal was false and unsubstantiated. He contended that no evaluation was done on his performance and as such the allegation was baseless.
7. He further testified that the allegation of gross misconduct against him was also not supported by any evidence. He contended that when he was called to appear before the Board, the Board resolved to extend his compulsory leave to allow for further investigation. However, he was never invited to the Board thereafter to explain himself or to call witness.
8. He maintained that the alleged misconduct was not substantiated by evidence and it remained mere allegation. He contended that all was well until 9<sup>th</sup> December 2022 when he advised the Board that it could not hold a third special Board meeting in one year. He maintained that the advice was lawful and within his mandate as the Secretary to the Board and as such the Board was not justified to dismiss him for the reason of doing his job in accordance with the law.
9. He further testified that the Board of Directors was not inquired to transact any business including terminating his employment. He contended that Article 42 (f) of the respondents Articles of Association provided that a director ceases being one upon resignation. He contended that Luceta Njeri Ngari, who was appointed by Kenya National Chamber of Commerce (KNCC), resigned vide letter dated 22nd December 2022 to take up appointment as Chief Officer in Embu County Government.
10. She was not reappointed by KNCC as a director after the resignation but the chairman of the Board purported to bring her back in order to secure quorum for the Board. Without her the Board would have no quorum under Article 52 of the Respondents' Article of Association. Consequently, he contended that the resolution of the Board to dismiss him on 5<sup>th</sup> April 2023 was a nullity because the Board had no quorum to transact any business.
11. He prayed for the reliefs sought contending that nothing was paid to him after the termination.
12. On cross-examination, he stated that he was not served with any report from the ad hoc committee until he saw it in court. He confirmed that there was no official meeting of the Board on 14<sup>th</sup> December 2022 and that there was no official notice of Board meeting before he wrote the advice that holding another special Board meeting would be contrary to the law. He clarified that his advice in the letter dated 9<sup>th</sup> December 2022 was in response to a request for the meeting by the Board chairman.
13. He admitted that Clause 3.7.3 of WASREB Guidelines provides that extra meeting can be held with permission from the County and on need basis. He denied ever insubordinating the Board and maintained that he only did his job of advising the Board not to act contrary to the law. As a result, he was sent on compulsory leave on 14<sup>th</sup> December 2022.



14. He admitted that while on compulsory leave, he was served with show cause letter giving him 6 days to respond instead of 21 days provided under Section 12 of the Respondents HR Manual. He contended that section 12 of the manual entitled him to 21 days to respond to show cause before interdiction and as such the Board violated his contract by sending him to compulsory leave and thereafter sending him with show cause letter with a 6 days period to respond.
15. The claimant admitted that on 19<sup>th</sup> August 2022, the Board resolved that he visits Cooperative Bank to discuss possibility of securing a loan for capital works. He maintained that there was Board resolution to obtain a loan. He denied that he insubordinated the Board by borrowing a loan from Cooperative Bank. He maintained that he could not borrow any loan without the Board's authority. He clarified that the problem of unremitted statutory deductions and debts were historical and stated that he found them there when he was appointed. He pointed accusing figure at the Board for the financial mess.
16. The respondent called its acting General Manager Ms Nancy Mucia Mwakirie who testified as RW1 and adopted her written statement as evidence. She also produced a bundle of 16 documents as exhibits. In brief she stated that there was a Board meeting on 14<sup>th</sup> December 2022 for induction of the new Board member. The meeting had been agreed on during another meeting held on 25<sup>th</sup> November 2022 when the new Board members were inaugurated. She contended that the claimant attended the Board meeting on 25<sup>th</sup> November 2022.
17. RW1 further testified that the Board met on 14<sup>th</sup> December 2022 and also attended a staff meeting who wanted to be addressed by the Board on matters they had raised in a previous meeting in July 2022. On the same day the claimant was sent on compulsory leave to pave way for investigations by an ad hoc committee. The committee investigations revealed disciplinary issues.
18. Subsequently, the claimant was served with a show cause letter charging him with:-
  - a. In subordination by failing to prepare Board meeting on 14<sup>th</sup> December 2022.
  - b. Procurement of Maji Soft Billing Software without Board resolution.
  - c. Borrowing loan without mandate from the Board.
19. RW1 confirmed that the claimant responded to the show cause letter in writing and thereafter he was accorded hearing by the Board. However, the Board resolved to undertake investigations within 30 days and subsequently served the claimant with a dismissal letter. She contended that the resolution to dismiss the claimant was done by five Board members including Luceta Njeri Ngari. She admitted that Luceta Njeri Ngari had written a resignation letter dated 22<sup>nd</sup> December 2022 but the other Board members requested her to continue sitting so that the Board would have quorum until the next General meeting. She confirmed that the said Board member is still a Director.
20. Finally, RW1 testified that the claimant was paid all his salary during the compulsory leave and after the dismissal he was paid his terminal dues as per the payroll.
21. On cross-examination, she admitted that the claimant was yet to be paid three months' salary in lieu of notice offered vide the termination letter. She further admitted that the claimant was entitled to gratuity at the rate of 31% per year. However, she clarified that clause 5.8.1 of the Respondent's HR Manual provided that gratuity was only payable upon completion of the contract but the claimant did not complete his contract term.
22. She reiterated that the claimant was dismissed for insubordinating the Board. However, she admitted that as at November 2022, the Board had exhausted its four meetings for the year. She further admitted



- that WASREB Guidelines allow only six meetings per year including two Special Board Meetings. She admitted that any extra meeting requires authorisation from the County Government.
23. She reiterated that on 25<sup>th</sup> November 2022, the Board met and resolved that it would hold a special meeting on 14<sup>th</sup> December 2022. However, she admitted that the resolution was verbal and no minutes of the Board exists as proof of the Resolution.
  24. She further testified that Article 51 of the Respondents' Article of Association allows the chairman and Board members to requisition for a Board meeting by a notice to the secretary and that is what the chairman did vide a letter dated 30<sup>th</sup> November 2022. However, she admitted that there was no written approval from the County Government to hold extra Board meeting on 14<sup>th</sup> December 2022.
  25. She admitted that the work of the General Manager includes advising the Board. However, she denied being aware that the claimant advised the Board that it was unlawful to hold extra special Board meeting.
  26. As regard the ad hoc committee, RW1 admitted that the claimant was not called to give a statement during the investigation by the committee. However, she clarified that under minute 7 of the Special Board held on 27<sup>th</sup> February 2023, it was resolved that the claimant would attend the full Board for hearing. Minute 8 then confirmed that the respondent had financial constraint leading to accumulation of debts including statutory levies not being remitted on time. Minute 9(e) further recorded that the County Government had not paid the respondent over Kshs.5,000,000.
  27. RW1 admitted that the Board is responsible for preparing budget and allocating funds. She admitted that she did not know how much the Board allocated for payment of debt in the year 2022/2023.
  28. As regards Director Luceta Njeri Ngari, RW1 admitted that she wrote a letter of resignation from the Board. She admitted that Article 42 provides that a director vacates office by resignation. She further admitted that, by letter dated 28<sup>th</sup> February 2023, the chairman requested Luceta Njeri Ngari to rescind her resignation. RW1 admitted that there is no legal provision allowing for rescission of a resignation by a director. She admitted that by minute 3 of the meeting held on 28<sup>th</sup> February 2023, the Board members resolved that it would reach out to shareholders for directions on the matter. Finally, she admitted that there is no letter from the shareholders authorising Luceta Njeri Ngari to continue as a director.
  29. On re-examination, RW1 stated that the claimant was not required to appear before the ad hoc committee because it was investigatory. She further stated that the County Government was represented in the Board and therefore the extra special Board meeting on 14<sup>th</sup> December 2022 was duly approved by the County Government.

### **Submissions**

30. The claimant submitted that the alleged insubordination of the Board and its activities was not valid. He contended that he worked in harmony with the Board until 9<sup>th</sup> December 2022 when he wrote to the Board advising that it could not hold a third special Board meeting without written authority from the County Government.
31. He submitted that the advice was lawful and within his duty as the General Manager/Secretary to the Board. He contended that the advice was meant for the interest of the Board Members to avoid future possible challenges and even possible prosecution for abuse of office. He stressed that the State Corporation Act, Mwingozo, and Government Directives are in agreement that a Board can only hold a maximum of four regular meetings and two special meetings in a year.



32. He further submitted that, any extra meetings must be sought from the relevant Minister in writing, justified both in intent and cost, and authority for the same be granted in writing. He pointed out that Guideline 3.7 (2) and (3) by WASREB provides that it is good practice for a Board to hold four meetings within a financial year and not more than six meetings upon approval from County Water Department.
33. He maintained that dismissing General Manager for giving a lawful advice to the Board, which is his core duty, is absurd and abuse of the authority of the Board. He contended that the alleged insubordination was false and not substantiated.
34. He further submitted that the Board also failed in its duty to make the necessary budgetary support to enable him pay the necessary debts including statutory levies which he found when he was appointed to the office. He further submitted that the County Government itself had owed the respondent Kshs.5,852,451.40 as per Minute No.9/27/2/23. He further blamed the Board for failure to provide budget allocation for repairs and maintenance of infrastructure. Consequently, he denied the alleged offence of poor performance.
35. He further submitted that the alleged misappropriation of company funds was also not substantiated. He contended that no report of Internal Audit was produced to prove any loss or misuse of company funds. Further that, no report or complaint has been made to EACC or DCI to investigate and charge him.
36. As regards the loan of Kshs.723,000/-, the claimant submitted that the loan was for Maji Soft Billing Software and it was procured with Board's approval and it was fully repaid. Consequently, he maintained that he was unfairly dismissed for trumped up and unproven charges.
37. As regards the procedure followed, he submitted that Clause 12.4.2 of the respondent was violated. He contended that under the said clause, an employee is supposed to be served with a show cause letter first and then interdiction or suspension to follow. He contended that compulsory leave he was exposed to, was a strange concept in the Respondent's disciplinary procedure. He further faulted the Board for sending him to compulsory leave before the investigations. He contended that the hurry in which the process was completed was proof that the Board was malicious and involved unfair labour practices.
38. He also submitted that the decision to dismiss him was done without quorum and with involvement of strangers in the Board. He submitted that Article 52 of the Respondent's Articles of Association read with Clause 3.4.1 of the WASREB Guidelines provide that a quorum required for a Board to transact lawful business is 5 Board members. He submitted that Luceta Njeri Ngari wrote a letter resigning from the Board. He reiterated that Article 42 (f) of the Respondent's Articles of Association provides that one ceases to be a Board member upon tendering a resignation.
39. He further submitted that the request by the chairman to Luceta on 28<sup>th</sup> February 2023 to rescind the resignation and the acceptance by her on 1<sup>st</sup> March 2023 was absurd because she had ceased being a member of the Board for over three months. Further the Board did not seek advice from the appointing authority as resolved under Minute 3/27/2/2023 by the Board in its meeting held on 27<sup>th</sup> February 2023. Consequently, he submitted that his dismissal was unlawful because the Board was not properly constituted to make the decision to charge him, extend his compulsory leave and to dismiss him from employment.
40. For emphasis, he relied on the case of *Katiba Institute & 3 others v Attorney General & 2 others* [2018] e KLR where the court held that a meeting that is inquorate has no jurisdiction to transact lawful business and any business transacted will be a nullity.



41. In conclusion, he maintained that his dismissal was substantively and procedurally unfair and prayed for the reliefs sought in the suit. For emphasis he cited the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR, *Mary Chemweno Kiptui v Kenya Pipeline Co.Ltd* [2014] eKLR and *Emmanuel Mambo Oduory v One Acre Fund* [2020]eKLR.
42. The Respondent on the other hand, submitted that a proper procedure was followed before dismissing the claimant from employment. It submitted that on 14<sup>th</sup> December 2022, the Board attended a meeting in the claimant's office and staff members demanded audience with the Board. During the meeting, the staff members raised many issues including poor leadership by the claimant, favouritism, bullying, withholding of salaries and failure to remit statutory deductions and other deductions to financial institutions.
43. It further submitted that due to the said issues raised by the staff and the fact that the claimant had failed to prepare reports for the Board meeting of the day, the claimant was placed on compulsory leave vide the letter dated 14<sup>th</sup> December 2022 to pave the way for investigations into the said allegations. It submitted that compulsory leave is a measure of removing an employee from his place of employment without interfering with his contract terms in order to facilitate objective and credible investigations. For emphasis, it cited the case of *Bernard Mwaura Mbuthia v Nyahururu Water & Sanitation Company Ltd & another* (2019) eKLR and *Thomson Karongo & 2 others v James Omariba Nyaoga & 3 others* [2017] eKLR.
44. The respondent further submitted that it served the claimant with a show cause letter and he responded. Thereafter he was accorded a hearing before the Board to respond to the report by the ad hoc committee. The Board then considered and found the evidence in support of the misconduct overwhelming and dismissed the claimant. It maintained that the procedure followed was fair and in compliance with section 41 of the [Employment Act](#) because the claimant was heard before the termination.
45. As regards the reasons for the termination, the respondent submitted that it has presented sufficient evidence to prove that the claimant grossly misconducted himself on several occasions. Consequently, it was entitled to dismiss him summarily under section 44 of the [Employment Act](#).
46. It submitted that the Board received allegations from staff members and constituted an ad hoc committee to investigate the same. The committee then prepared a report which established the accusations levelled against the claimant including: -
- a. Poor general performance
  - b. Insubordination and gross misconduct
  - c. Flaunting of procurement procedures
  - d. Failure to remit staff contributions.
  - e. Illegal procurement of loans without the Board's authority
  - f. Illegal procurement of Maji Software Company contrary to Article 71 of its Articles of Association.
47. The respondent submitted that based on the investigations report and the general performance of the company, it was evident that the claimant was not up to task in his mandate. Further, it was evident that the claimant had misconducted himself severally by acting ultra vires his powers including borrowing



- a loan from Cooperative Bank contrary to the Boards minutes of 19<sup>th</sup> August 2022 and Article 40 of its Articles of Association.
48. For emphasis, it cited several decisions including Court of Appeal decision in Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others [2019] eKLR that the reason for termination is that which employer genuinely believed to exist and which caused it to dismiss the employee from service.
  49. As regards the issue of quorum, the respondent submitted that the minutes of the meeting held on 14<sup>th</sup> March 2023 (Exh.D.8) is evidence that six Board members attended plus the acting General Manager. It submitted that section 4 of the WASREB Guidelines for State Corporations provided that the quorum for Board meeting is 5 where the Board has 8 or 9 members, and 4 where the members are seven and below. It contended that the Board, on that date accorded the claimant a hearing and resolved that the claimant had misconducted himself, it further resolved that a dismissal letter would be issued after seeking legal advice from the County Legal Department about the verdict of dismissal.
  50. The respondent submitted that the Board minutes dated 5<sup>th</sup> April 2023 (Exh.D.10) is evidence that the decision to dismiss the claimant was made on 14<sup>th</sup> March 2023. It contended that the minutes indicates that the chairman had sought the presence of the Embu County Legal advisor to advice whether the decision to dismiss the claimant was sound and procedurally right. It submitted that the date of termination being 5<sup>th</sup> April 2023 cited in the termination letter dated 12<sup>th</sup> April 2023 was an error because the termination was decided on 14<sup>th</sup> March 2023.
  51. As regards the resignation of director Luceta Njeri Ngari, the respondent submitted that she only registered an intention to resign but after the matter was discussed by the Special Board on 27<sup>th</sup> February 2023, by letter dated 1<sup>st</sup> March 2023 she agreed to continue serving until new directors were elected, so as not to interfere with the quorum of the Board.
  52. The respondent submitted that the following conditions must be met before a director voluntarily resigns: -
    - a. Letter of resignation.
    - b. Statutory declaration confirming that the director is resigning voluntarily.
    - c. Extract from the Minutes of a meeting of the Directors noting the resignation; and
    - d. Notice of cessation of office of Director (Form CR9) prepared and submitted to the Registrar of companies.
  53. The respondent submitted that the above conditions were not met in the alleged resignation of Luceta Njeri Ngari and therefore she reviewed a valid member of the Board lawfully discharging her duties of a director of the company.
  54. Consequently, it contended that any Board resolution where Luceta Njeri Ngari attended was sound and legitimate.
  55. As regards the reliefs sought, the respondent submitted that the claimant is not entitled to compensatory damages since the dismissal was lawful. It further submitted that since the claimant did not serve through the contract term of three years, he is not entitled to payment of service gratuity. It fortified the foregoing submission by citing clause 5.9.1 and 5.9.8 of its HR Manual.
  56. Finally, it submitted that the claimant was not entitled to salary review before the expiry of his 3 years contract term, and he acknowledged that fact in an internal memo he wrote (Exh.D.2). For emphasis,



it cited clause 4.11 and 4.12 of its HR Manual which provides for review of salary by the Board after three years of service to the Company. Consequently, it prayed for the suit to be dismissed with costs.

### Issues for determination

57. Having considered the pleadings, evidence and submission, there is no dispute that the claimant was employed by the respondent as its General Manager from April 2021 to April 2023 when he was dismissed for misconduct. The following issues for determination were agreed by the parties: -
- a. Whether the termination was grounded on valid reasons.
  - b. Whether the Board lacked quorum to dismiss him.
  - c. Whether the procedure followed was fair.
  - d. Whether the reliefs sought are merited.

### Reasons

58. Section 43 (1) of the [Employment Act](#), 2007 Provides that: -

“1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”

59. Section 45 (2) (a) & (b) of the [Employment Act](#), 2007 Provides that: -

“(2) A termination of employment by an employer is unfair if the employer fails to prove:

- (a) that the reason for the termination is valid;
- (b) that the reason for the termination is a fair reason—
  - i. related to the employee’s conduct, capacity or compatibility; or
  - (ii) based on the operational requirements of the employer; and”

60. In this case the termination letter dated 12<sup>th</sup> April 2023 stated as follows: -

“Daniel Mutuku Njuguna

General Manager

Embe Water & Sanitation Company

O Box 195-60104

Siakago

Dear Daniel

Re: Termination Of Employment For Gross Misconduct



Reference is made to your 3-month paid compulsory leave that was communicated to you by the Board of Directors through a letter dated 14<sup>th</sup> December 2022; the show cause letter dated 6<sup>th</sup> March 2023; your subsequent written responses dated 10<sup>th</sup> March 2023 and your oral submission (disciplinary hearing) made on 14<sup>th</sup> March 2023 before the Board. Further reference is made to the subsequent one (1) month extension of the paid compulsory leave as communicated to you in our letter dated 14<sup>th</sup> March 2023.

As indicated in our letter dated 14<sup>th</sup> December 2022 (on paid Compulsory Leave), the Board was to conduct investigations into your conduct as pertains the allegation that were levelled against you. The investigations culminated in the show Cause letter with a summary of allegations as follows:-

- i. Insubordination.
- ii. Failure or inability to perform assignments diligently without any cause.
- iii. Misappropriation, misuse, cause of loss and destruction of company's funds, facilities and properties.
- iv. Failing in your responsibilities as the General Manager for the efficient management of the affairs of the Company, the day-to-day operations and administration of the Company in consultation with the Board and enforcing these regulations as may be necessary, subject to any instructions as may be given by the Board.
- v. Interference with the Board of Directors function by attempting to block access to documents that you used to illegally secure a loan at Cooperative Bank (Siakago Branch)

From the investigations conducted by the Board of Directors, and on the basis of your submissions, both written and oral, it is the considered opinion of the Board that you, at different periods of your tenure as the General Manager of Embewasco, including during your current leave break, committed offences that are of grievous nature and unacceptable. You flouted provisions of the *Public Procurement and Asset Disposal Act* 2015 and the Regulations of 2016; provisions of the Embewasco Human Resources Policy Manual and the Best Practices Guidelines of Water Services Regulatory Board (WASREB), all of which you should have safeguarded as anticipated in Section 3.9 of Embewasco's Human Resources Policy Manual and Chapter Six of *Constitution of Kenya, 2010*.

Through this letter, the Board of Directors communicates to you of its unanimous decision to terminate your contract with immediate effect as resolved during its Special Board Meeting held on 5<sup>th</sup> April 2023. This is in line with the 'Terms and Conditions of Contract' Section 7 (Renewal/ Termination of Contract) that you read, understood and signed on your appointment day (20<sup>th</sup> April 2021) and further as anchored in the Embe Water and Sanitation Company's Human Resources Policy Manual Section 5.9 Subsection 5.9.7.

In accordance with Terms and Conditions of Contract, you are entitled to:

- i. Three-month basic salary in lieu of notice.



ii. Gratuity, being a percentage to be calculated for the period worked in relation to the would-be total amount for the full contract period.

iii. A Certificate of Service

Please, note that: -

i. The stipulated final payments, which shall take into account the recovery of any monies owed to the company by you, shall be processed after clearance from the Company.

ii. This communication supersedes any other earlier communication pertaining your contract.

We wish you well in your future endeavours.

For and behalf of the Board,

Jackson Kinyua Njana

Chairman

Board Of Directors”

61. The above letter states that after investigations into the allegations set out in paragraph 2 of the letter, and upon written and oral submissions by the claimant the Board found that he committed offences that are grievous and unacceptable. That he had flouted provisions of the [Public Procurement and Asset Disposal Act](#) and the Regulation of 2016, provisions of the Embewasco HR Policy Manual and the Best Practices Guidelines of WASREB, all of which he was supposed to safeguard as per section 3.9 of the Respondent’s HR Policy Manual and Chapter six of [the Constitution](#) of Kenya, 2010.
62. The claimant contended that he worked well with the Board until 9<sup>th</sup> December 2022 when he wrote a letter advising the Board that it could not hold a Special Board on 14<sup>th</sup> December 2022 without approval from the County Government because the meetings of the Board during the current financial year had been exhausted. As a result, the Board held a meeting with the staff and received several allegations against the claimant which led to him being sent on compulsory leave on the same day.
63. All the issues raised by the staff and the report by the ad hoc committee were not new issues. They were issues within the knowledge of the Board or which they were supposed to know. The procurement of Software and a loan to pay for the same, outstanding debt of statutory deductions not remitted were all in the Board’s minutes. They were issues within the Budgetary role of the Board to ensure that there were funds allocated to pay for procured goods and services, and to pay debts.
64. It has not been shown how the claimant alone could procure the software and secure a loan from Cooperative Bank. None of the staff members who alleged bullying and mismanagement gave evidence during the disciplinary hearing or before this court. To that extent, I agree with the claimant that the disciplinary process against him was malicious and a retaliation to his letter dated 9<sup>th</sup> December 2022. This view is fortified by the generality in which the charges were framed and the generality in the reason for the termination as appearing in paragraph 3 of the termination letter; -

“From the investigations conducted by the Board of Directors, and on the basis of your submissions, both written and oral, it is the considered opinion of the Board that you, at different periods of your tenure as the General Manager of Embewasco, including during



your current leave break, committed offences that are of grievous nature and unacceptable. You flouted provisions of the *Public Procurement and Asset Disposal Act* 2015 and the Regulations of 2016; provisions of the Embewasco Human Resources Policy Manual and the Best Practices Guidelines of Water Services Regulatory Board (WASREB), all of which you should have safeguarded as anticipated in Section 3.9 of Embewasco's Human Resources Policy Manual and Chapter Six of *Constitution of Kenya, 2010.*"

65. As regards the alleged insubordination, I agree with the claimant that he did his duty by advising the Board against holding an extra Board meeting on 14<sup>th</sup> December 2022 without written approval from the County Government. Section 3.7.2 and 3 of the WASREB Guidelines states that: -

- "(2) Committees as a good practice shall not have more than four sittings in a financial year and the dates for the following years meetings must be defined in schedule before the start of the new financial year.
- (3) Unless extra meetings and agenda are communicated and agreed functionally with the County Water Department the recommended best practice is not to exceed 6 board meetings in a year."

66. The advice by the claimant was correct and therefore it did not amount to insubordination. Article 236 of *the Constitution* provides that: -

- "A public officer shall not be-
  - a. Victimized or discriminated against for having performed the functions of his officer in accordance with *the Constitution* or any other law; or
  - b. Be dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law."

67. On the basis of the above Constitutional provision, the court has a duty to pronounce itself against decisions of a public organ which has failed in its oversight role and only victimizes an officer for advising against violation of the law and policy. According to section 3.5 of the WASREB Guidelines, the Board has the duty to approve strategic plan, approve annual budget and ensure it is forwarded to the County Government, approve annual procurement plan, ensure work plan is in place and ensure staff performance. In this case, the Respondent's Board presided over the alleged mismanagement or non-performance by the company staff and only purported to sanitize itself by victimising and dismissing the claimant for reasons beyond his control including debts he found already in the company.

### **Quorum of the Board**

68. The claimant contended that the Board lacked quorum, and contended that the respondent's Board required at least five members for it to transact any lawful business. He contended that only four out of seven members sat to hear him and to pass a resolution to dismiss him. However, the respondent maintained that the Board had sufficient quorum.

69. Article 65 of the Respondent's Articles of Association provides that: -

- "The quorum necessary for the transaction of the business of the Directors shall be a third (1/3) of the total number of Directors."



70. Based on the above Article a third (1/3) of seven directors is approximately three directors because you cannot have a fraction of a person. However, according to the claimant there were six members after resignation by Luceta Njeri Ngari and as such the proper quorum ought to have been four (4). The claimant stated in paragraph 12 of his written statement that 4 out of 7 Board Members met to hear and dismiss him.
71. Having considered the minutes of the Full Board held on 14<sup>th</sup> March 2023, six directors attended including Luceta Njeri Ngari. It means that even without Luceta Njeri Ngari, the Board still had sufficient quorum of five out of six. On 5<sup>th</sup> April 2023, Rev.Peter Kariuki and Jane Gicuku Mugo did not attend but five attended including Luceta Njeri Ngari. It means that even excluding Luceta Njeri Ngari from the list of attendance, there was still four other members who formed sufficient quorum to transact business of the Board.

### **Procedure followed**

72. The claimant contended that fair procedure was not followed since in the HR Policy Manual, there is no provision of compulsory leave. Further his appointment letter did not mention compulsory leave. My understanding of the term compulsory leave is that an employee is forced by the employer to leave his work station and stop performing his/her duties. It is not interdiction or suspension which are normal disciplinary processes provided for in appointment letters or employer's HR Policy Manuals like in this case.
73. Courts have found nothing wrong with compulsory leave being forced on an employee. (See the case of Bernard Mwaura Mbuthia v Nyahururu Water and Sanitation & another and Thomson Karongo & 2 others v James Omariba Nyaoga & 3 others, supra). However, my view is that compulsory leave should not be used to deny an employee a right granted by the HR procedure Manual or to breach his contract. The employer has a duty to justify the reason for compulsory leave as opposed to adopting procedure of interdiction and suspension in the HR Manual on contract of employment.
74. In the present case, section 12.4.2 of the Respondent's HR Manual provides for the procedure to be followed before disciplinary action is taken against an employee. First, the supervisor is to investigate the cause of the misconduct and issue a warning to the employee. If no improvement is shown, a show cause letter will be issued and the employee has 14 days to respond. If the response is not satisfactory, the employee may be interdicted for not more than two months on half basic pay plus allowances. In the alternative, the employee may be suspended with nil basic pay but with full allowances if he is convicted of a serious criminal offence or is facing proceedings which may lead to dismissal.
75. The question that arises is whether, the employer herein was justified to send the claimant to compulsory leave in the face of the foregoing elaborate procedure set by the HR Manual. In my view, I see no justification for the compulsory leave. As I have observed herein above, the allegation made by the staff against the claimant were issues known by the Board. They were allegations that required the claimant to respond first before being sent away from the office. The respondent has not justified why it abandoned the procedure in the HR Manual and opted for a compulsory leave before giving the claimant an opportunity to explain himself as provided under section 12.4.2 of the HR Manual.
76. The foregoing notwithstanding, I am satisfied that the claimant was accorded a fair opportunity to defend himself in writing and orally before the decision to dismiss him was reached. He never protested about the procedure adopted by the Board. It follows that the compulsory leave given to him never had no effect on the final decision taken against him.



77. Section 41 of the *Employment Act*, 2007 provides that: -

- “(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

### Reliefs sought

78. I have found that the termination of the claimant’s employment contract was not grounded on a valid and justifiable reason. Section 43 of the *Employment Act*, 2007, cited above is candid that where the employer fails to prove a valid and fair reason, the termination is unfair within the meaning of section 45 of the *Employment Act*. Consequently, I find that the claimant is entitled to declaration that his dismissal was unlawful and unfair.
79. In view of the foregoing, the claimant is entitled to compensatory damages under section 49(1) of the *Employment Act*, namely salary in lieu of notice plus compensation for unfair termination. The respondent acknowledged that the claimant is entitled to three months salary in lieu of notice and therefore I award him the same being  $Kshs.116,730 \times 3 = Kshs.350,190.00$ .
80. As regards compensation, the claimant served for two years and had legitimate expectation to continue working for another one year before his contract term ended. He was dismissed prematurely for no proven misconduct. He had not been issued with any warning for misconduct or poor performance. Having considered all the above factors, I award him six months gross salary as compensation for unfair and unlawful termination of his employment contract being  $Kshs.116,730 \times 6 = Kshs.700,380.00$
81. The claimant further prayed for gratuity at the rate of 31% of his basic salary for the two years served. His contract of service and section 5.9.8 of the Respondent’s HR Manual provided for payment of the said gratuity upon satisfactory completion of the contract. However, since the contract was unlawfully terminated by the respondent after completion of two years, the claimant is entitled to gratuity for the two years served. His basic pay was Kshs.85,000 per month. Therefore, he is awarded gratuity of  $Kshs.85,000 \times 31/100 \times 24 = Kshs.632,400.00$ .

### Conclusion

82. I have found that the termination of the claimant’s contract of employment was unfair and unlawful for want of a valid and justifiable reason. Consequently, I enter judgement in his favour in the following terms: -
- a. Declaration that the termination was unlawful.
- b. The claimant is awarded the following: -
- i. Notice.....Kshs.350,190.00



- ii. Compensation.....Kshs.700,380.00
- iii. Gratuity.....Kshs.632,400.00
- Total Kshs.1,682,970.00

- c. The claimant is awarded costs and interest at court rates from the date hereof.
- d. The award is subject to statutory deductions.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 18TH DAY OF APRIL, 2024.**

**ONESMUS N MAKAU**

**JUDGE**

**Order**

**This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N MAKAU**

**JUDGE**

