



**Torto v African Acadamey of Siences (AAS) (Cause 361 of 2020)
[2023] KEELRC 872 (KLR) (18 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 872 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 361 OF 2020
JK GAKERI, J
APRIL 18, 2023**

BETWEEN

NELSON TORTO CLAIMANT

AND

AFRICAN ACADAMEY OF SIENCES (AAS) RESPONDENT

JUDGMENT

1. The Claimant initiated this suit by a Memorandum of Claim filed on 20th August, 2020 and amended on 17th August 2020 alleging unlawful termination and breach of contract on the part of the respondent for failure to review the claimant's performance for purposes of renewal of contract.
2. The claimant avers that he was an employee of the respondent as the Executive Director from 17th August 2017 with an annual basic salary of USD205,320 with an education allowance of 5% of basic salary, to 31st July 2020 when he was unlawfully dismissed.
3. The claimant avers that the employment contract entered into between the claimant and the respondent provided for a 3-year contract which was to be renewed upon evaluation of performance of the claimant and recommendation of the management committee of the Governing Council of the African Academy of sciences, the Respondent.
4. The claimant states that the evaluation process was supposed to be commenced six months prior to the end of the contract and concluded with a recommendation to renew the contract at least three months to the end of the contract.
5. The claimant avers that the respondents Governing Council failed to evaluate his performance as required by the *Employment Act* and the Respondent's Human Resource Policy and Procedures Manual and as a result he was prompted to express his intent to renew his contract vide a letter dated 19th March 2020.



6. The claimant avers that despite his efforts, the Respondent failed to evaluate his performance which caused him extreme psychological torture due to the uncertainty about his future as an employee of the respondent.
7. The claimant further avers that on the 15th June 2020 his lawyer wrote to the Respondent in respect of the renewal of the contract and as a result he was suspended through a letter dated 3rd July 2020 which letter the claimant avers was defamatory and was copied to all fellows of the African Academy of Sciences.
8. The claimant avers that the Respondent orchestrated an uncondusive hostile working environment against him forcing him to resign on 31st July 2020.
9. The claimant averred that the respondent's conduct was unlawful and amounted to breach of the employment Contract between the claimant and the respondent.
10. The claimant prays for judgment against the Respondent as follows:
 - a. A declaration that the action by the Respondent of failing to review the claimant's performance as an Executive Director for purposes of renewal or non- renewal within the timelines set out by the Employment Contract was a direct breach of the Employment contract between the claimant and the respondent
 - b. General damages for breach of Employment Contract
 - c. Aggravated damages for psychological torture suffered as a result of failure to evaluate him by the Respondent and the failure to issue either notice of renewal or non-renewal of the contract.
 - d. A declaration that the Respondent's conduct that ended the claimant's employment amounted to unfair, unlawful and constructive dismissal and further, was in breach of *the Constitution* of Kenya, the *Employment Act* and principles of employment law
 - e. Damages for unfair and constructive dismissal from employment equivalent to twelve (12) months gross salary totalling to United States Dollars (USD) 205,320 with interest thereon at court rates from the date of award until payment thereof in full
 - f. Unpaid half salary for the month of July 2020 totalling to USD 8,558
 - g. Three months salary totalling to USD 51,348 being payment in lieu of notice.
 - h. Relocation grant for the claimant
 - i. Certificate of service.
 - j. Cost of the suit plus interest thereon from the date of the award
 - k. Any other relief that the Honourable court may deem fit and just to grant in the circumstances.



Respondent's case

11. In response to the memorandum of claim the Respondent filed a statement of defence and counter claim dated 26th July 2021.
12. The respondent denies the allegations in the memorandum of claim and states that the claimant was not unfairly dismissed but voluntarily resigned on the 31st July 2020.
13. The respondent further states that the claimant was entitled to a gross monthly salary of USD 10,962 which amounts to gross annual salary of USD 131,544.
14. The respondent stated that the claimant was on a three (3) year fixed contract of employment commencing on 14th August 2017 and expiring on 13th August 2020.
15. It is the Respondent's case that it had no legal obligation to evaluate the performance of the claimant as alleged nor make any recommendation for renewal of the contract and that the Human Resource Policy and Procedures Manual referred to by the claimant was hurriedly prepared by the claimant in a calculated and fraudulent scheme to his benefit to increase his tenure in the office and the policy was yet to be operationalised.
16. The respondent states that the claimant resigned voluntarily on 31st July 2020 which was 13 days to the expiry of the contract in a calculated move to avoid the impending expiry of his contract of employment as a basis for unjust enrichment.
17. The respondent avers that the claim for unfair, unlawful and constructive dismissal by the claimant is baseless and without any legal merit and urges the court to dismiss the suit with costs.
18. In its counter claim, the Claimant avers that the Respondent was employed by the respondent on the 14th August 2017 as an Executive Director for a period of 3 years at an annual gross salary of USD 131,544 translating to a gross monthly salary of USD 10,962.
19. That on the 16th February the Respondent falsely and fraudulently raised his monthly salary from USD 10,962 to 14,168 per month without the approval of the Governing Council by forging a letter dated 16th February 2018.
20. The claimant states that the Respondent further raised his salary to USD 15,560 from March 2020 to June 2020 without approval, he also orchestrated schemes meant to his benefit and increase his tenure in office.
21. The claimant states that they did not discover the salary increment on time as the Respondent had advised the claimant that the laws of Kenya prohibited the release or disclosure of staff salary information.
22. The claimant avers that the Respondent's conduct of increasing his own salary without the approval of the claimant's Governing Council and subsequent attempt to alter the terms of contract was in total breach of his fiduciary duty to the Claimant, its constitution and contract of employment which was motivated by bad faith and wilful intention to defraud the Claimant.
23. The Claimant averred that as a result of the Respondents actions it had to shoulder and pay illegal salary increments and benefits which had not been approved.



24. In its counter claim, the Claimant prays for judgement against the Respondent as follows:
- a. USD 35,266 being unapproved salary increase of USD 3,206 per month earned by the Respondent from February 2018 to December 2018.
 - b. USD 3,526.6 being unapproved pension contribution of USD 320.6 per month earned by the respondent from February 2018 to December 2018.
 - c. USD 21,846.75 being the aggregate of unapproved 13th Cheque payment earned by the Respondent in December 2018 and December 2019.
 - d. USD 55,986 being the unapproved salary increase of USD 3,999 per month earned by the Respondent from January 2019 to February 2020.
 - e. USD 9,787.68 being the unapproved pension contribution increase of USD 699.12 per month earned by the Respondent from January 2019 to February 2020.
 - f. USD 18,392 being unapproved salary increase of USD 4,598 per month earned by the respondent from March 2020 to June 2020.
 - g. USD 3,084 being unapproved pension contribution of USD 771 per month earned by the respondent from March 2020 to June 2020.
 - h. USD 20,944 being unapproved further housing allowance of USD 1,496 per month earned by the respondent from January 2019 to February 2020.
 - i. USD 6,244 being unapproved further housing allowance of USD 1,565 per month earned by the respondent from March 2020 to June 2020.
 - j. Costs of the counterclaim.
 - k. Interest on (a) to (j) above inclusive at court rates from the date of filing suit till payment in full.

Claimant's evidence

25. The Claimant's written statement rehearses the contents of the amended memorandum of claim.
26. The Claimant testified that the Respondent offered him a 3 year renewable contract and the Respondent's Human Resource and Procedure Manual provided for the timelines for renewal commencing 6 months prior to the expiry of the time and a clarification would be given 3 months prior and the renewal was subject to evaluation which the Respondent did not undertake.
27. That an evaluation conducted by a professional firm gave the Claimant 4.02 out of 5 and his two letters on renewal of contract were unresponded to and was suspended by letter dated 3rd July, 2020 at half-salary and logged out of the Respondent's email system and resigned on 31st July, 2020.
28. The Claimant avers that the salary adjustment during his tenure related to standard of living and all were approved by the Finance Risk Audit and Compliance Committee (FRACC) of the Governing Council (GC) and the Governing Council itself.
29. It was his testimony that the Human Resources Policy and Procedures Manual was taken through all processes and denied having forged the letter dated 16th February, 2018 allegedly signed by the President of the GC and relied on email communication between the President of the GC and CWII, one Akinyi.



30. It was the Claimant's evidence that all budgets of the Respondent were approved by the GC on recommendation of the FRACC.
31. On cross-examination, the Claimant confirmed that the Human Resource Policy and Procedure Manual was approved by the GC but could not recall the meeting and had no resolution on the approval.
32. According to the Claimant, the approval date of the Human Resources Policy and Procedures Manual (HRM) was 25th September, 2018 but effective from July 2020 and the durations he relied upon in his letters to the Respondent were in the document.
33. The witness stated that he had no record or evidence of a previous manual.
34. He conceded that the letter dated 15th June, 2020 by his counsel to the Respondent was written before the Human Resource Manual became operational.
35. CWI relied on the Deloitte Forensic Audit Finding Report dated 18th January, 2021 as evidence that all salary increments were approved by the GC as the audit firm found.
36. The witness confirmed that under *the Constitution* of the Respondent, the Executive Director's remuneration was determined by the GC and he had no minute of the GC resolution approving his salary increment from USD 10,962 to USD 14,168 and from USD 14,168 in 2018 to 14,961 in 2019 and from USD 14,961 to USD 15,560 in 2020. The witness testified that GC approved the Respondent's budget inclusive of salaries of which included the Executive Director's (Claimant's) salary. That Deloitte found that the Claimant's salary increment of 38.6% from 2018 to 2020 had not been approved by the GC.
37. It was his testimony that the salary increment for other staff required approval of the GC on recommendation of the FRACC whose Chair was one Mr. Fred Murunga. The witness testified that he had no evidence of approval of the salary increment of other staff by FRACC or GC.
38. It was his testimony that the PWC Report on Salary and Benefits Survey, 2018 did not make any recommendations but had a conclusion. That before the PWC Report, the Respondent was not paying housing allowance. The witness confirmed that he had neither email nor letter from the President of the GC on the reviewed salaries.
39. As regards the Dorion Associates Evaluation Report, April 2020, the witness testified that he approved the evaluation operationally as part of his work to commission the evaluation and pay them and it had been budgeted for.
40. On re-examination, the Claimant testified that there was a previous manual but not on record.
41. It was his testimony that renewal of contract under the Human Resource Manual required evaluation of the GC.
42. That the salary increment of the Claimant was within the rate approved by the GC.
43. The witness testified that the GC approved the revised organizational structure.
44. He further testified the management would make submissions on salary to the FRACC and if accepted, the same would be presented before the GC by the Chair of FRACC and management would implement the structure and salaries.
45. That the forensic audit was conducted after he had left employment.



46. CWII, Rosemary Akinyi testified that proposals for salary increment were made to the GC for approval and all employees would receive a letter signed by her, except hers which would be signed by the Executive Director.
47. That the funders reviewed the organization and a re-organization took place and a new structure was adopted and implemented in 2019 and salaries were adjusted accordingly.
48. That the 13th pay cheque was an incentive and had been approved by FRACC.
49. The witness confirmed the email communication with the President of the GC, Professor Dakora on the reviewed salaries and testified that he signed the Claimant's letter but disowned the signature.
50. That the President of the GC did not contact her on the renewal of the Claimant's contract.
51. Strangely, the witness testified that she was aware of the evaluation of the members of the GC and participated in the appointment of Dorion Associates.
52. It was her testimony that the Claimant had no role in the preparation of the Human Resource Budget.
53. According to CWII, the allegations made against the Claimant were false.
54. On re-examination, the witness testified that the Human Resource Manual required approval by FRACC, signature of the President of the GC and would be minuted and that the one on record had been approved but there were no minutes of approval.
55. The witness stated that approval of the document by the Senior Management Team (SMT) was not by the GC and it had no indication of approval by the GC. However, the effective date was July 2020.
56. It was her evidence that FRACC approved the salary increments and the 13th pay cheque and the GC Meeting held in December 2018 did the same though the witness had no minutes.
57. CWII confirmed that the salary increments were approved as a block figure.
58. That the Claimant's letter on salary increment was signed by Professor Dakora.
59. It was her testimony that she was interviewed by Deloitte and gave them the relevant documentation and the Human Resource Manual had been endorsed for use.

Respondent's evidence

60. RWI, Professor Nyasse told the court that he was the Secretary to the GC from 2007 upto 2022 and attended all GC meetings and was the custodian of its minutes.
61. That the GC did not make any decision on salary increment for the Claimant or other employees.
62. The witness lamented that the Claimant and the Respondent could not agree between themselves.
63. On cross-examination, the witness confirmed that the GC approved all budgets of the Respondent on recommendation of FRACC. That the GC did not typically interrogate the budget items but relied on the wisdom of the FRACC. That FRACC addressed financial issues.
64. The witness confirmed that FRACC presented budgets to the GC for approval and advise the GC. That the Treasurer of the GC sat in FRACC and the Chair of FRACC was not a member of the GC.
65. It was his testimony that FRACC could not approve anything but would merely recommend and could not recall the GC approving the salary increments and the 13th pay cheque.



66. The witness confirmed that he was aware of a recommendation by the Secretariat to raise salaries and the 37th GC meeting held on 8th and 9th December approved the budget of 2019 at USD 44,490,613.
67. The witness confirmed that Dorion Associates carried out an evaluation of the GC and he participated albeit partially. That the Claimant was not a member of the GC.
68. The witness testified that the Claimant performed well and was a good Executive Director.
69. As regards renewal of the Claimant's contract, the witness stated that it was not automatic. The witness regretted that the Claimant was not evaluated before a decision on renewal or non-renewal was made.
70. The witness confirmed that the GC met twice a year and the Claimant's letter dated 19th March, 2020 was not discussed by the GC. That he was unaware of the Claimant's suspension and was not interviewed by Deloitte.
71. The witness confirmed that the GC neither discussed nor resolved that the Claimant be suspended.
72. On re-examination, the witness testified that all decisions required resolutions of the GC for institutional memory.
73. That the Dorion Evaluation involved the members of GC and the Claimant was not a member.
74. RWII, Professor Felix Dapare Dakora, the President of the GC testified that he was a member of the GC. The witness summarised the responsibilities of the GC in relation to salaries of the Executive Director and other staff and oversight over the secretariat.
75. He testified that the GC operated through technical committees and FRACC handled salaries, would examine the figures and make recommendations to the GC but had no approval rights. The GC approved all decisions. That recommendations of salary increment were made every year and annual increment were made to all staff including the Claimant and not specific to the Claimant.
76. That the Human Resource Manual on record was not approved by the GC.
77. The witness acknowledged the suspension letter.
78. It was his testimony that the Claimant had intimated that information on salaries could not be shared with the GC, which was false
79. That the Dorion Associates evaluation was for the GC and the Claimant used it as a ploy in a bid to secure renewal of the contract as he was not a member of the GC. That the evaluation report was a document of the secretariat and had not been approved by the GC.
80. On cross-examination, the witness confirmed that the Claimant's contract had no renewal clause but had an option for renewal.
81. That the Respondent's Constitution gave room for renewal of Directors contracts provided there has been an evaluation and the GC was to evaluate the Claimant and it had not conducted an evaluation by 3rd July, 2020 when he was suspended.
82. The witness testified that the Claimant was not given notice of non-renewal or renewal of the contract of employment.
83. The witness testified that the Respondent was not time bound to respond to the Claimant's letter on renewal of the contract and the Claimant instructed counsel who forwarded a demand letter which was not responded to.



84. The witness testified that he did not participate in the Dorion Associates evaluation and was opposed to it as it was a waste of money and the Claimant's strategy to reposition himself for re-appointment. That not all members of the GC participated in the evaluation.
85. The witness testified that he had nothing to do with the Dorion Associates evaluation.
86. That the revised organizational structure of the Respondent was approved by the GC and the letter dated 16th February, 2020 was forged as it did not originate from his desk. That CWII inserted the digital signature.
87. It was his testimony that the 13th pay cheque paid in 2019 was not approved by the GC but the budget for 2019 was approved but the components of the budget were not disclosed and the issue of salary increase was not discussed.
88. The witness testified that the 2019 Budget did not include the 13th pay cheque and FRACC did not recommend it.
89. That the witness was unaware of the Deloitte report who had not interviewed him.
90. On re-examination, the witness testified that salary increments were referred to FRACC which recommended the same to the GC for decision making.
91. That any evaluation of the GC members had to originate from the GC itself. That the Claimant's request for renewal was based on unapproved Human Resource Manual.

Claimant's submissions

92. Counsel addressed three issues relating to;
 - i. Whether the Claimant committed any unlawful or unprocedural actions while in employment.
 - ii. Whether the Claimant (incorrectly indicated as Respondent) was unlawfully terminated from employment.
 - iii. Whether the Claimant is entitled to the reliefs sought.
93. As regards the 1st issue, on allegations made against the Claimant relating to unapproved salary increments, forged letter and non-disclosure of information about salaries, counsel submitted that;
 - i. All budget matters were handled by FRACC and submitted to the GC for approval as the Deloitte Report revealed.
 - ii. Salaries for staff was approved in the budget. The 13th pay cheque was approved by the GC's 37th meeting and no incidences of fraud had been reported.
94. Counsel urged that the 2018 salary increment included a cost of living adjustment of 10% and the newly approved organizational structure and the 2019 and 2020 increment of 5.6% was consistent with the GC approved rate.
95. That the Claimant merely communicated to staff by an internal memo dated 12th December, 2018.
96. Counsel submitted that the letter dated 16th February, 2018 allegedly forged by the Claimant was the subject of email communication between RWII and CWII and was authentic as CWII testified.



97. Counsel further submitted that the Respondent had not proved any wrong-doing on the part of the Claimant.
98. On termination, counsel submitted that the Claimant was suspended immediately after his counsel wrote a demand letter dated 15th June, 2020 asking the Respondent to evaluate the Claimant's performance.
99. That there was bad blood between the Claimant and Professor Felix Dakora as discernible from their communication to each other and the fact that Professor Dakora authored the suspension letter.
100. Counsel relied on the decision in *Coca Cola East and Central Africa Ltd V Maria Kagai Ligaga* (2015) eKLR to urge that the Respondent's breach of the employment contract was fundamental to justify the Claimant's resignation.
101. That the Claimant had looked forward to a renewal of 5 years. The court was urged to find that the Claimant was constructively dismissed.
102. As regards the prayers sought, counsel urged that the court should declare that the Respondent was in breach of the employment contract and was thus liable to pay months notice as general damages that the Claimant was constructively dismissed, 12 months compensation and other reliefs.

Respondent's submissions

103. The Respondent's counsel identified five issues for determination, namely; breach of contract by the Respondent, constructive dismissal of the Claimant, reliefs to the Claimant and Respondent, Counter-claim and costs.
104. As to whether the Respondent breached the contract of employment on performance evaluation and renewal, counsel submitted that the Claimant adduced no evidence to show that the Respondent's Human Resource Manual had been approved by the GC and the contents of the manual should have been incorporated in the contract.
105. That the effective date of the Human Resource Manual was July 2020 and the Claimant's contract was due to end on 13th August, 2020.
106. According to the Respondent's counsel, it was impractical for the Respondent to evaluate the Claimant according to the timelines in the Human Resource Manual. That the Respondent could not have breached non-existent provisions.
107. Counsel submitted that the Claimant had no legitimate expectation that his contract would be renewed as the contract has no renewal clause and the claimant did not prove that the Human Resource Manual had been approved.
108. Reliance was made on the decision in *Communications Commission of Kenya & 5 others v Royal Medial Services Ltd & 5 others* [2014] on the basis of legitimate expectation.
109. Counsel argued that the renewal was not automatic as it was subject to "recommendation of Management Committee of the AAS and approved by GC."
110. Counsel submitted that fixed term contracts carry no expectation of renewal unless the contract states as much as held in *Francis Chire Chachi v Amatsi Water Services Co. Ltd* [2012] eKLR, *Isaiah Makhoha v Basco Products (K) Ltd* [2014] eKLR among other decisions.



111. That the Claimant was suspended to allow for investigation and was not a reaction to the Claimant's demand letter of 15th June, 2020.
112. As regards constructive dismissal, counsel relied on the decision in Coca Cola East and Central Africa Ltd V Maria Kagai Ligaga (Supra) to urge that the Claimant did not satisfy any of the tests.
113. Counsel urged that the Respondent had reason to justify the Claimant's suspension and finding otherwise would deny it the right to exercise its managerial prerogative.
114. That the Claimant reacted to the suspension letter to avoid responding to the issues raised by the Respondent.
115. Counsel further submitted that the Respondent did not breach any fundamental term of the contract.
116. It was submitted that the Claimant amended the claim to include constructive dismissal in August 2022.
117. That the Claimant had failed to demonstrate that the work environment was unconducive and hostile.
118. As regards the reliefs sought, counsel urged that the Claimant was not entitled to damages for breach of contract as it was not implied in the contract and the Claimant was not constructively dismissed but resigned.
119. That the salary for July 2020 was paid and no notice pay was due.
120. That the claim for relocation grant had no basis.
121. As regards the counter-claim of USD 175,077.03, it was submitted that the amount comprised the salary increments, pension contributions, 13th pay cheque and house allowance not approved by the Respondent's GC.
122. Counsel relied on the evidence of RWI who testified that he was the secretary of the GC and the foregoing payments were not approved by the GC.
123. Counsel further relied on the Deloitte report to submit that the Claimant's salary was not approved by the GC.
124. That the memo dated 12th December, 2018 on the benefits was purportedly based on the Human Resource Manual and followed the 2018 PWC salary and benefits survey.
125. Counsel submitted that the Deloitte report stated that there was no discussion on the 13th pay cheque.
126. Counsel prayed for the dismissal of the Claimant's case with costs.

Findings and determination

127. The issues for determination are;
 - i. Whether the Claimant was constructively dismissed.
 - ii. Whether the Claimant is entitled to the reliefs sought.
 - iii. Whether the Respondent is entitled to the reliefs sought in its counter-claim.
128. Before delving into the issues herein above, it is essential to dispose of matters germane to the Dorion Associates Evaluation Report, the applicability of the Respondent's Human Resources Policy and



Procedures Manual, last update 2018, and the Deloitte Forensic Audit Factual Findings Report January 2021, all produced by the Claimant.

129. As regards the Dorion Associates Report which was an evaluation, all witnesses are in agreement that it was an evaluation of members of the GC.
130. The Claimant confirmed that the evaluation was done at the behest of the management and there was no resolution on it by the GC although it was approved as a budget activity. It was unclear as to how the members of the GC were being evaluated not by the appointing authority but by a professional firm engaged by the management and not all members of the GC participated.
131. Puzzlingly, the Claimant did not explain the objective or purpose of the evaluation or whether he forwarded the report to the FRACC for placement before the GC for adoption as GC document. RWII testified that it was not adopted by the GC.
132. Similarly, the Claimant adduced no evidence as to whether he was a member of the GC and tendered no evidence of invitation to any meeting of the GC or attendance of any.
133. Both RWI and RWII were unambiguous that the Claimant was not a member of the GC, evidence the Claimant did not controvert.
134. From the evidence on record, it is clear that the Claimant was not a member of the Respondent's GC.
135. For what purpose then was the Claimant evaluated by the consultants?
136. It is unclear as to when Dorion Associates was contracted as neither an engagement letter nor terms of reference was provided.
137. RWI testified that he partly participated in the evaluation and confirmed that it was an evaluation of members of the GC and the Claimant was not supposed to participate in the exercise.
138. RWI testified that the Claimant obtained a good score and he would not hesitate to give him a good score. That he performed as he was supposed to as the Executive Director of the Respondent.
139. RWII on the other hand was categorical that he did not participate in the evaluation by Dorion Associates and was opposed to it and did so in writing but had no written evidence of the objection.
140. According to the witness, the exercise was part of the Claimant's strategy for re-appointment as the Respondent's Executive Director. It is unclear how the witness's score found its way into the report yet he did not participate. He disowned the letter dated 23rd April, 2020 addressed to the President and members of the GC.
141. The letter has neither a receipt stamp nor acknowledgement by anyone. It is also unclear as to how the Claimant accessed a report addressed to the President and members of the GC.
142. Based on the evidence on record, it is the finding of the court that nothing turns on the Dorion Associates evaluation and it is of no moment.
143. As regards the Human Resources Policy and Procedures Manual, the document is emphatic at page 2 that its approval date was 25th September, 2018 but the effective date was July 2020.
144. At page 3, the documents states as follows;

“This document has received endorsement for use by the SMT of the AAS and remains a live document effective from 25th September, 2018.”



145. The document has no form of authentication by anyone. It has neither the signature or endorsement of the Executive Director, as head of the secretariat which typically originates such documents, nor the secretary or President of the Respondent's Governing Council (GC).
146. The Claimant confirmed on cross-examination that all operation documents required approval of the GC but could not recall when the Human Resource Manual was approved by the GC and had no minute of the approval.
147. According to the Claimant, the approval date was 25th September, 2018 but effective date was July 2020 and his contract of employment ended on 31st July, 2020.
148. The Claimant purported to rely on an older version of the union which he did not avail as evidence.
149. The witness admitted that the letter by his counsel dated 15th June, 2020 was written before the Human Resource Manual became operational.
150. Equally, CWII confirmed on cross-examination that the Human Resource Manual would be recommended by FRACC, signed by the Chairman of the GC and minuted, but had no evidence of approval of the Manual on record.
151. The witness confirmed that 'SMT' mean Senior Management Team of the Respondent, not the GC.
152. The witness further confirmed that the Human Resource Manual on record had no indication that it had been approved by the GC and had not been signed by anyone.
153. Strangely, the Claimant counsel's letter dated 15th June, 2020, Claimant's evidence and submissions relied exclusively on Clause 3.4.1 of the copy of the Human Resource Manual on record to urge that the renewal of the Claimant's contract was subject to timelines neither set out in *the Constitution* of the Respondent, December 2018, nor the contract of employment dated 19th April, 2017.
154. From the evidence on record and the foregoing, it is the finding of the court that the purported Respondent's Human Resources Policy and Procedures Manual, 2018 was not operational and had neither been recommended by FRACC for approval nor approved by the GC and was thus inconsequential.
155. As regards the Deloitte report, while the Claimant testified that he was aware of the findings of the investigation by Deloitte undertaken after he had left employment, the RWI was categorical that he was unaware of the source of the report and the Audit firm did not interview him but acknowledged that Mr. F. Murunga was the Chair of FRACC.
156. RWI did not contest the authenticity of the Deloitte report and findings. Significantly, the Respondent tendered no evidence to demonstrate that it did not in fact engage the audit firm to carry out a forensic audit and at any rate the report addresses the issues the Claimant was accused of in the suspension letter and appears authentic.
157. It is the finding of the court that the Deloitte report is reliable in the absence of primary documents.
158. As to whether the Claimant was constructively dismissed, the starting point is an elucidation of the principle of constructive dismissal as demonstrated by courts. The classical enunciation was however by Lord Denning MR in *Western Excavating ECC Ltd V Sharp* (1978) 2 WLR 344.



159. In *Milton M. Isanya v Aga Khan Hospital Kisumu* [2017] eKLR, Onyango J. stated as follows;
- “In constructive dismissal, the desire to resign is from the employee as a result of a hostile working environment or treatment by the employer. A constructive dismissal occurs where the employer does not express the threat or desire to terminate the employment but frustrates the employee to the extent that the employee tenders resignation.”
160. Similarly, in *Nathan Ogada Atiagaga v David Engineering Ltd* [2015], the court expressed itself as follows;
- “Constructive dismissal occurs when an employee resigns because their employer’s behaviour has become so intolerable or made life so difficult that the employee has no choice but to resign. Since the resignation was not truly voluntarily, it is in effect a termination. For example, when an employer makes life extremely difficult for an employee to force the employee to resign rather than outright firing the employee, the employer is trying to effect a constructive discharge.”
161. In *Coca Cola East and Central Africa Ltd v Maria Kagai Ligaga* [2015] eKLR, the Court of Appeal enunciated the elements of constructive dismissal including the fundamental terms or of essential terms of the contract of employment.
162. Whether there has been a repudiatory breach of the fundamental terms of the contract through the conduct of employer, the conduct must be a fundamental or a significant breach going to the root of the contract, causal link between the employers conduct and the resignation, conduct with or without notice, within a reasonable time, burden of proof and varied fact pattern.
163. The court is further guided by the sentiments of Makau J. in *Godfrey Allan Tolo v Tobias O. Otieno & another* [2022] eKLR as follows;
- “For constructive dismissal to be inferred, the employee must have resigned within a reasonable time from his employment with or without notice as a result of the employer’s hostile treatment or hostile working conditions at his work place. The employer must not have expressed the desire to terminate the employee . . .”
164. I will not proceed to apply the foregoing propositions of law to the facts of the instant case.
165. It is common ground that the Claimant had a written contract of employment dated 19th April, 2017 stating as follows;
- “On behalf of the African Academy of Sciences (AAS), I am delighted to offer you the position of Executive Director of the African Academy of Sciences (AAS). This contract of employment commences on 14th August, 2017 for a period of 3 years renewable upon evaluation of performance and the recommendation of the Management Committee of the AAS Governing Council. The initial six month period will be probationary after which your performance will be appraised and you will be advised accordingly.”
166. The contract makes no reference to the Respondent’s Human Resource Manual or any other document. The Claimant voluntarily signed the contract on 3rd May, 2017.
167. Evidently, renewal of the Claimant’s employment contract was not automatic. It had to be preceded by a performance evaluation and a recommendation by the Management Committee.



168. It is also not in dispute that the Claimant wrote to the Governing Council (GC) of the Respondent on 19th March, 2020 requesting for renewal of his contract of employment. The letter gave a detailed account of his achievements during the first term as well as the action points.
169. The Respondent's GC neither acknowledged nor responded to the Claimant's letter.
170. Subsequently, the Claimant's counsel wrote a demand letter dated 15th June, 2020 alleging breach of contract by the Respondent.
171. Counsel's letter relied on the duration of action set out in the unapproved Human Resources Policy and Procedures Manual on record which the court held as ineffectual elsewhere in this judgement.
172. The letter was not responded to.
173. RWII testified that the Respondent was not subject to any timelines as far as renewal of the Claimant's contract of employment was concerned, an argument the court is in agreement with.
174. Be that as it may, it is evident that the Respondent's GC had not taken and did not take any step to evaluate the Claimant's performance to determine whether to renew the contract or not and no recommendation had been made as provided by the employment contract. It is unclear why the Respondent was unresponsive to the Claimant on this issue.
175. It would appear as if the Respondent had already made up its decision not to renew the Claimant's contract of employment.
176. It is common ground that the Claimant relocated to Kenya when he was offered employment by the Respondent in 2017 as evident from paragraph 2 (vi) of the appointment letter and the contract was initially for 3 years though renewable as adverted to above.
177. As a diligent employee and person in a foreign country, the Claimant acted within his rights when he wrote to the Respondent's Governing Council in March 2020 seeking renewal of the contract of employment. He was entitled to know what steps the Respondent was taking as he had only five (5) months of employment before August 2020 when the three year period would lapse. He needed the information for purposes of planning and organizing himself.
178. Puzzlingly, the GC had not responded three (3) months later and did not care to respond to the Claimant advocate's letter, either.
179. However, in early July 2020, the Claimant received a suspension letter containing a litany of allegations of misconduct by the Claimant, thirteen in total. The Respondent alleged that the misconduct had occasioned a huge financial strain and losses to the Respondent. The letter sent the Claimant on an indefinite suspension for purposes of an investigation and gave no other direction. The letter had no attachment and required no action on the part of the Claimant.
180. Intriguingly, RWI testified that he had no knowledge of the suspension letter as the issue was neither tabled nor discussed by the GC. The only remote background to the suspension is the email communication between the Claimant and the President of the AAS, RWII in August 2019 where the latter was requesting for past annual increases in salaries, justification and the actors in the process.
181. The fact that the Respondent prioritised the suspension over an acknowledgement or response to the Claimant's letters on his employment portrays the Respondent as an insensitive employer.
182. In the court's view and in the circumstances of this case, the duration of employment was a fundamental term of the Claimant's contract of employment and the Respondent's reticence in the



face of the impending lapse of the Claimant's contract would appear to show that the Respondent no longer intended to be bound by this provision of the contract and the Claimant was thus entitled to treat himself as discharged from further performance as explained by Lord Denning in *Western Excavating ECC Ltd v Sharp* (Supra).

183. The Respondent's failure to honour its part of the contract by initiating a performance evaluation of the Claimant amounted, in the court's view to a repudiatory breach of a fundamental term of the contract since the evaluation for purpose of renewal of the contract went to the root of the contract and the Claimant acted within a reasonable time.
184. The Claimant's resignation letter set out seven (7) reasons why the Claimant resigned including the Respondent's non-responsiveness to his letters and the indefinite suspension.
185. The Claimant appear to have reached the end of the tether and had no other option but quit employment. It is unclear why the Respondent was not anxious to evaluate the Claimant yet it could have done so but rely on the discretion of the management committee not to renew the contract. Silence was not a fair option.
186. For the foregoing reasons, it is the finding of the court the proximate cause of the Claimant's resignation was the Respondent's conduct. The Claimant's employment was constructively terminated.
187. Having found that the Claimant was constructively dismissed, I will now proceed to examine the reliefs availed to the Claimant.
 - i. Having found that the Claimant was constructively dismissed on account of the Respondent's unresponsiveness to his requests for renewal of contract, a declaration is hereby issued that the failure to evaluate the Claimant's performance as ordained by the letter of appointment was a breach of the terms of the employment contract.
 - ii. General damages for breach of contract.
188. This remedy does not exist under Kenya's employment law and is declined. The 3 months notice period urged by counsel is a statutory relief under Section 49(1)(a) of the [Employment Act](#) and is not a species of general damages.
 - iii. Aggravated damages
189. In determining whether the Claimant is entitled to aggravated damages, the court is guided by the sentiments of the Court of Appeal in *DK Njagi Marete v Teachers Service Commission* [2020] eKLR where the court stated as follows;

“To justify this award, the appellant urged us to consider the case of *Obonyo & another v Municipal Council of Kisumu* [1971] E.A 91 at 94 where the predecessor of this court referring to the English decision of *Rookes v Barnard & others* [1964] AC 1129 stated that:

“It will be convenient to begin summarizing very briefly the effect of *Rookes V Barnard*. In the first place it was held that exemplary damages for tort may only be awarded in two classes of case (apart from any case where it is authorised by statute) these are first, where there is oppressive, arbitrary or unconstitutional action by the servants of the government (emphasis in the original) and secondly where the defendants conduct was calculated to procure him some benefits, not necessarily financial at the expense of the plaintiff. As regards the actual award, the plaintiff must have suffered as a result of the punishable behaviour, the punishment imposed must not exceed what would likely have been imposed in criminal



proceedings if the conduct were criminal; and the means of the parties and everything which aggravates or mitigates the defendant's conduct is to be taken into account.”

190. The Claimant tendered no evidence of entitlement to aggravated damages on account of non-renewal of the employment contract as it was not automatic.

The claim is disallowed.

iv. Damages for constructive dismissal, 12 months gross salary

191. Having found that the Claimant was constructively dismissed by the Respondent, the Claimant is entitled to the relief provided by Section 49(1)(c) of the *Employment Act*, 2007 subject to compliance with the provisions of Section 49 (4).

192. In arriving at the quantum of compensation, the court has taken into account the following; The Claimant wished to continue being an employee of the Respondent as evidenced by his letter dated 19th March, 2020 and his counsel's letter dated 15th June, 2020. The Claimant was a diligent employee and an evaluation by a 3rd party, who was not the employer gave him a good rating which RWI confirmed reflected his performance as an Executive Director of the Respondent. The Claimant was an employee of the Respondent from 14th August, 2017 and the contract was scheduled to lapse after 3 years but he resigned on 31st July, 2020 a duration of about 3 years. The suspension letter dated 3rd July, 2020 made several serious allegations against the Claimant and he did not explain his position on the alleged improprieties. He did not deny the allegations which would appear to have emboldened the Respondent to file a counter-claim against the Claimant. For instance, he did not deny the allegation that he misled the GC on non-disclosure of salaries under Kenya's employment law which may have contributed to the alleged lack of approval of the Claimant's salary increase.

193. In the circumstances, the court is satisfied that the equivalent of one (1) months salary is fair.

v. Unpaid half salary for July 2020 USD 8,558

194. The Claimant testified that after he was suspended on 3rd July, 2020, his salary was reduced by half. It is unclear why his salary was reduced as the suspension letter was not explicit on the terms of the suspension including the duration. The Respondent's witnesses did not contradict this allegation nor justify the reduction of salary.

The Claimant is awarded half salary for July 2020.

vi. Pay in lieu of notice, 3 months salary

195. Having found that the Claimant was constructively dismissed, he is entitled to notice pay. Strangely, the letter of Appointment dated 19th April, 2017 had no exit or termination clause.

196. The Claimant appear to have relied on the unapproved Respondent's Human Resources Policy and Procedures Manual which the court found ineffectual as it was yet to become a Governing Council document as the policy making organ of the Respondent.

197. In the court's view, the proposal by the Senior Management Team (SMT) in 2018 had neither been tabled before the FRACC nor approved by the GC. In the absence of any guidance from the Respondent's Constitution dated 11th December, 2018, the court shall award the Claimant one (1) month's salary in lieu of notice.

vii. Relocation grant



198. Under the letter of Appointment, the Claimant was entitled to a relocation grant for self and a maximum of four dependants payable at the beginning and end of the contract and having held that he was constructively dismissed, the court is satisfied that relocation grant to the Claimant is merited and the same is granted.

viii. Certificate of service

199. The Claimant is entitled to a certificate of service by dint of Section 51 of the [Employment Act, 2007](#).

Counter-Claim

200. The totality of the Respondent's counter-claim is that the Claimant received various sums of money as salary increments, pension contribution, 13th pay cheque and housing allowance which had not been approved ostensibly the Respondent's Governing Council.

201. Regrettably, the alleged unapproved payments were never placed before the Claimant for a rebuttal.

202. More significantly however, the Respondent tendered no documentary evidence to buttress its case against the Claimant. Although, the Respondent filed copies of a letter allegedly signed by RWII, on the Claimant's salary increment dated 10th February, 2018, which the witness disowned as a forgery he admitted that one Rosemary Akinyi affixed RWII's digital signature and the alleged forgery was not disclosed to anyone including the GC.

203. Email communication between CWI and RWII reveal that the two communicated on the letter and RWII made changes to the draft.

204. The Second document is an Internal Memo by the Claimant to staff on review of benefits. A copy of the Salary and Benefits Survey November 2018 was also attached as were the Claimant's payslips and email communication with RWII.

205. Regrettably, none of these documents establish that the salary increments paid to the Claimant were unapproved by the GC of the Respondent.

206. The Respondent adduced no scintilla of evidence to demonstrate how the Claimant unilaterally increased his salary annually, paid himself housing allowance and other payments exclusively to himself and without knowledge or approval of the Respondent's Governing Council or knowledge of any of the three committees of the Governing Council and in particular FRACC.

207. Relatedly, no investigation had been conducted before the Claimant left and there had been no audit queries by the internal or external auditors as testified by the Claimant.

208. The Deloitte Forensic Audit commissioned by the Respondent found inter alia that;

- i. The salary increment between 2018 and 2020 by 38.6% had not been approved by the GC and the salary review letters 2019 and 2020 were signed by CWII.
- ii. The audit also found that the salary increment was consistent with rate approved by GC.
- iii. The 37th meeting of the GC held on 8/9 December 2018 did not discuss the 13th Cheque and house allowance.
- iv. The GC approved the budget for the year 2019 amounting to \$ 44,690,613 and minutes signed and confirmed.



That 11% of the budget related to personnel costs and factored in the 5.6% salary increase for costs of living adjustment and the Claimant's increase was not approved by the GC. The budget included the 13th cheque and housing allowance benefit.

- v. The GC approved the revised Organizational Functional Structure on 17th November, 2017 and hiring.
- vi. Clause 11.4.6 of the Respondent's Constitution states that the remuneration of the Executive Director is determined by the GC and the GC had not approved the 29% salary increment of the Claimant during the 35th GC meeting.
- vii. The GC approved the budget for 2020 as proposed though minutes were not availed to the auditor.

That there was no specific approval of the Claimant's increase of 4% though it was consistent with the rate proposed by FRACC.

- viii. RWII approved the May 2020 payroll with the increments as proposed by FRACC.

209. In sum, the forensic audit found that although the GC minutes had no specific resolution approving the Claimant's salary increment, 2018 – 2020, all the increments were consistent with the rates approved by the GC and were recommended by FRACC for approval, the committee the Respondent had entrusted with matters relating to budget and were accordingly approved as part of the Respondent's salary to its employees and annual increments were approved as a matter of routine as RWII testified.
210. The Respondent did not avail any minute of the GC to demonstrate that it indeed did not approve the alleged Claimant's salary increments.
211. Relatedly, the Respondent's Constitution is unclear on how the GC was supposed to determine the Claimant's remuneration. Whether it was by the entire GC or one of the existing Committees or Adhoc Committee to recommend to the GC.
212. Similarly, none of the recommendations made by FRACC to the GC were availed to prove that the items were not in the budget.
213. The Respondent did not tender evidence on the structure of its budget or how the approval process was conducted bearing in mind that it had a zero budget and thus all items had to be specifically budgeted for.
214. Similarly, evidence of the Chairperson of FRACC or any member could have demonstrated how the budgetary processes were undertaken at the committee level.
215. RWI, Professor Nyasse confirmed on cross-examination that FRACC addressed all financial issues including the budget and if proposals was found appropriate, it would present them before the GC for approval.
216. The witness further confirmed that the GC approved budgets without interrogating the details as it relied on the advice of FRACC.
217. RWII confirmed as much on cross-examination.



218. On salary increments, the witness confirmed that he was aware that the Secretariat had made a recommendation to raise salaries approved in the 2019 Budget. Equally, RWII Professor, Dakora confirmed that the annual budgets approved by the GC included the annual budget for salaries including increases.
219. Equally, RWI confirmed on cross-examination the GC approved all the Budgets of the Respondent as presented by FRACC.
220. In totality, the evidence before the court shows that although individual employee salaries including that of the Claimant and increments were not presented to the FRACC or the GC as distinct budgetary items, the same had been presented before the FRACC by management and by FRACC to the GC and all had received the necessary approval as confirmed by the Claimant, CWI as well as RWI and RWII in cross-examination.
221. It is also noteworthy that the Respondent tendered no evidence to demonstrate how the GC determined the Claimant's salary and what was not complied with, if anything. Neither RWI nor RWII accused the Claimant for having acted irregularly.

Counter-claim*

222. In its counter-claim, the Respondent is claiming specific sums allegedly paid to the Claimant yet the same had not been approved from 2018 to 2020. The allegedly unapproved payments include; salary increments, 13th cheque, pension, and house allowance. In determining whether the Respondent's counter-claim is merited, the court is guided by the mantra that he who alleges must prove the allegations as encapsulated in the provisions of Sections 107, 108 and 109 of the [Evidence Act](#).
223. Section 107 (1) of the [Evidence Act](#) provides that;
1. Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
224. Similarly, Section 109 provides;
- The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie in any particular person.
225. Needless to belabour, the [Evidence Act](#) places a heavy obligation on the person who alleges that a particular fact(s) were in existence for a right or liability to crystallize. Puzzlingly, the Respondent tendered no evidence on the alleged payments to the Claimant or demonstrate that indeed the alleged payments had not been approved. The absence of evidence to show that the Claimant increased his salary in contravention of a prescribed procedure or framework instituted by the defendant or the increment was not budgeted for or that the issue was raised with him but he ignored instructions of the President of the GC, the GC or FRACC clearly reveals, in the court's view that the Respondent's counter-claim has not been proven and is accordingly dismissed.
226. A panoramic view of the Deloitte Forensic Audit Report reveals that the Respondent's governance structures were not as proactive as they ought to have been. Although it was disclosed that the GC would meet twice a year, no evidence was adduced on how often the Committees of the GC met.
227. Being the policy making body of the organization and the formulator of the Respondent's strategic direction congregating twice in a year leaves certain matters unattended to for too long and its bi-annual agenda may have been too congested to facilitate incisive interrogation of all matters by members of the GC. Three (3) or four meetings annually would be optimal.



228. In the circumstances, it is unsurprising to the court that Respondent's witnesses could not recall having approved the Claimant's salary increments yet the GC had approved all the budgets presented to it by FRACC and salaries are invariably a major component of the budget.
229. In conclusion, judgement is entered for the Claimant against the Respondent in the following terms;
- a. Declaration that Respondent's failure to evaluate the Claimant for purposes of renewal of the contract of employment was a breach of contract.
 - b. Equivalent of one (1) month's salary.
 - c. Unpaid half-salary for July 2020, if outstanding.
 - d. One (1) month's salary in lieu of notice.
 - e. Relocation grant.
 - f. Certificate of service.
 - g. Costs of this suit.
 - h. Interest at court rates from date of judgement till payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 18TH DAY OF APRIL 2023

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

