



**Indusa v Lake Victoria North Water Works Development Agency
(Formerly Lake Victoria North Water Services Board) & 5 others (Cause
27 of 2022) [2023] KEELRC 3432 (KLR) (29 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3432 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CAUSE 27 OF 2022
JW KELL, J
NOVEMBER 29, 2023

BETWEEN

KENNETH L INDUSA CLAIMANT

AND

**LAKE VICTORIA NORTH WATER WORKS DEVELOPMENT
AGENCY (FORMERLY LAKE VICTORIA NORTH WATER SERVICES
BOARD) 1ST RESPONDENT**
COUNTY GOVERNMENT OF KAKAMEGA 2ND RESPONDENT
**KAKAMEGA COUNTY WATER AND SANITATION COMPANY
LTD 3RD RESPONDENT**
COUNTY GOVERNMENT OF BUSIA 4TH RESPONDENT
BUSIA WATER AND SEWERAGE COMPANY 5TH RESPONDENT
FREDRICK ATWA 6TH RESPONDENT

JUDGMENT

1. The Claimant aggrieved by the Respondents' decision to transfer his services from the 1st Respondent to the 5th Respondent vide amended Statement of Claim dated 20th July 2017 sought for Judgment against the Respondents jointly and severally as follows:-
 - a. Declaration that the contract of employment signed on 4th February 2013 and renewed on 3rd February 2016 remained legal and binding on both parties and the Claimant is entitled to his full salary, allowances and gratuity.
 - b. An order that the Respondents do pay the Claimant the sum pleaded in paragraph 12 above.



- c. General damages for breach of employment contract.
 - C1. A declaration that the Respondents' behavior was high handed, malicious, arbitrary and highly reprehensible misconduct that departs from a marked degree of ordinary standards of decent behavior and is entitled to punitive damages.
 - C2. Declaration that the transfer was discriminative, unprocedural irregular, malicious, fraudulent, illegal and unfair thus null and void.
 - C3. Declaration that the Claimant suffered workplace harassment, bullying and intimidation.
 - C4. Declaration that the Claimant's constitutional rights under A10, A21 (3), A27, A29 (D), A35, A41, A47, A54 (1) (A) and A236 were violated and is entitled to punitive damages.
 - d. Interests on above at prevailing commercial rates
 - e. Cost of the claim.
2. The Claimant under the original claim dated 26th July 2017 filed his verifying affidavit and list of documents together with the bundle of copies of the documents all received in Court on the 27th July 2017. The Claimant filed his witness statement dated 4th May 2023 on the 16th May 2023. In support the claim was the Claimant's bundle of documents filed in Court on the 14th October 2022.
 3. The claim was opposed.
 4. The 1st Respondent entered appearance through the law firm of D.L. Were & Were Company Advocates and filed statement of defence dated 26th September 2017 and received in Court on even date. The 1st Respondent filed witness statement of CPA Antony Chelulobi Kisaka dated 15th May 2023 and received in Court on the 4th July 2023 together with supporting additional list of documents and the bundle of even date.
 5. The claimant filed reply to the 1st Respondent's response on the 29th May 2023.
 6. The claimant filed reply to all responses on the 5th April 2023 and filed additional bundle of documents on even date.
 7. The 2nd, 3rd and 6th Respondents entered appearance through the County Attorney office and filed response dated 7th February 2023 to the amended claim witness statement of Fredrick Atwa dated 7th February 2023 all received in Court on the 22nd February 2023.
 8. The 4th filed grounds of opposition and Notice of Preliminary Objection dated 20th March 2023 as its response.
 9. The 5th Respondent filed witness statement of Sarah Patrick Akasiba and list of documents all filed on 16th March 2023

Description of Parties

10. The Claimant is a former employee of the Lake Victoria North Water Services Board with work place defined as the Kakamega Busia Water Supply managed by the Board. He was transferred to serve at the 5th Respondent.



11. The 1st Respondent is a state corporation (Formerly Lake Victoria North Water services Board) incorporated under the provisions of Water Act, 2016, legal notice no. 28 of 26th April 2019 and legal notice no. 5 of 4th February, 2020. With perpetual succession and can sue and be sued in its corporate name.
12. The 2nd Respondent is a County Government established under the Constitution of Kenya and the County Governments Act.
13. The 3rd Respondent is water and sanitation company established under the Companies Act 2015 or its predecessor Act to provide water and sanitation services in Kakamega County.
14. The 4th Respondent is a County Government established under the Constitution of Kenya 2010 and the County Governments Act.
15. The 5th Respondent is a limited company established under the Companies Act 2015 or its predecessor to provide water and sanitation services in Busia County Government.
16. The 6th Respondent is an employee of the County Government of Kakamega appointed Acting Managing Director on position allegedly previously held by the Claimant in acting capacity.

The Claim

17. The Claimant states as follows:-
18. That that vide a contract of employment dated 21/1/2013, he was appointed to the position of Commercial and Finance Manager for a term of three years at a monthly salary scale of 54,000.00 – 108,000.00 – 162,000.00 in addition to other allowances.
19. That after the expiry of the contractual period, the Claimant's contract was renewed for a further term of three years with effect from 4/2/2016 upto 3/2/2019.
20. The Claimant pleaded that he had been performing his duties so diligently that he earned respect and favor of the outgoing Managing Director who on 9/5/2016 recommended that the claimant be appointed the 1st Respondent's Managing Director. That on 16.6.2016, the Claimant was appointed Acting Managing Director for the 1st Respondent- Lake Victoria North water services board, Kakamega Busia water supply.
21. That sometime in June, 2016 and in breach of his contract of employment, the Claimant received a letter jointly authored by the Acting Managing Directors' of Kakamega County Water and Sanitation Company limited and Busia Water and Sewerage Company Limited purportedly deploying him to the later in total disregard of his health status.
22. That on 4/7/2015 the Claimant was involved in a traffic accident where he sustained multiple fractures on the upper right femur, dislocated left hip joint and suffered a serious nerve injury to the left foot that confined him to a wheel chair. That the Claimant was attending treatment weekly in Eldoret Moi Referral Cedar and Mediheal Hospitals and requested to have his contract appropriately transferred to his contract station of Kakamega to allow him conveniently continue his treatment.
23. That notwithstanding the purported transfer harassment, bullying, intimidation and discrimination, the Claimant continued working for the 1st Respondent on behalf of 3rd and 5th respondents. However, the working conditions became so difficult and intolerable that he was unable to perform the duties efficiently for the following reasons:



- a. Payment of his salary and other allowances became so irregular that he was paid his July and August salary on 28/9/2016.
 - b. The Claimant has not been paid his monthly salary and allowances from the month of September 2016 upto date.
 - c. The Claimant's office was closed by the 6th Respondent without leave of the 1st Respondent forcing him to work from the board room at home, and sometimes in hotels where he endorsed cheques and payment vouchers.
 - d. The Claimant's work laptop and tablet that belonged to the 1st Respondent were confiscated by the 6th Respondent without leave of the 1st Respondent.
 - e. That despite subsistence of the contract of employment, the 1st Respondent has without any reasonable cause refused to assign the Claimant duties or resolve the deployment/transfer dispute to allow the Claimant transfer to his contractual station of Kakamega.
 - f. That the 1st Respondent has allowed third parties to interfere with the Claimant's work.
24. The Claimant asserts that the transfer/deployment was made in bad faith, was malicious, fraudulent, unfair discriminative was prejudicial and was further made in total violation of his contract of employment. Employment Act 2007, persons with disability Act, Occupational Health and safety Act and the transitional clause and other articles of the constitution of Kenya 2010.
 25. That the transfer was made without agreement of parties concerned.
 26. That the Claimant was the subjected to bullying harassment and intimidation and despite raising several complaints to the respondents and various government, his complaints went unresolved as the Respondents ignored, neglected or rejected to invoke paragraph 7.1 of the transfer deeds that provided for resolution of disputes arising from the transfer process.
 27. That the 6th Respondent, an employee of County Government of Kakamega coordinated and was personally involved in harassment, bullying and intimidation of the Claimant while the 1st 2nd and 4th Respondents watched in silence.
 28. That the Claimant was efficient in his work, competent, disciplined and had no disciplinary proceedings pending against him.
 29. That despite being informed of the foregoing intolerable conditions, the Respondents maintained a studious silence and failed to address the Claimant's grievances. That the Respondents aforesaid actions have not only exposed the Claimant to extreme psychological and emotional torture, but also to fundamental breach of his contract of employment.
 30. The Claimant asserts that he brought to the attention of the joint committee on devolution of water services of his medical condition but he was ignored.
 31. That by neglecting ignoring or rejecting to address the Claimant's complaint the 2nd 3rd 4th 5th and 6th Respondents became party to breach of employment contract by the 1st Respondent.
 32. That the Respondents' action violated the claimant's constitutional rights under Articles 10, 27, 29, 35, 41, 47, 54, and 236 of the Constitution.



The Defence

1st Respondent's Memorandum of response to the amended statement of claim.

33. The 1st Respondent admits that sometimes in June 2016 the Claimant received a letter jointly authored by the acting Managing Directors of Kakamega County Water and Sanitation Company Limited and Busia Water and Sewerage Company Limited deploying him to the latter. The 1st Respondent denies that the aforesaid deployment was in breach of the Claimant's contract of employment or that it was in total disregard of his health status.
34. The 1st Respondent asserts that it is a state Corporation, whose mandate among others was to provide oversight over Kakamega - Busia water supply. That the Claimant was not an employee of the 1st Respondent but an employee of Lake Victoria North Water Services Board, Kakamega – Busia water supply serving as the Commercial and Finance Manager from 21/1/2013 to 4/02/2016 and his contract was renewed for 3 years up to 3/2/2019.
35. That at the time of appointment and renewal of the Claimant's contract, Kakamega – Busia water supply formerly known as Western Water Company Limited had been placed under oversight of the 1st Respondent herein by the regulator, water services regulatory board following mismanagement and governance issues by Western Water Company Limited.
36. That following the promulgation of *the Constitution* of Kenya, 2010 County Public Works and services including water and sanitation services were devolved to the counties.
37. That this oversight and agency relationship between the 1st Respondent (A parastatal and principal) and Kakamega – Busia water supply (agent) ceased by operation of the law pursuant to the 2010 Constitution.
38. That as a result of devolution of water and sanitation services to the counties, the 2nd and 4th Respondents demanded from the 1st Respondent immediate separation (de-clustering) of Kakamega – Busia water supply and transfer of it's management to their respective counties.
39. That the 2nd and 4th Respondents formed a joint committee mandated to oversee smooth transition of water and sanitation function from Lake Victoria North Water Services board, Kakamega – Busia water supply including the mode of sharing assets, liabilities and staff.
40. That the decision to share existing Lake Victoria North Water Services board, Kakamega Busia water supply assets, liabilities and transfer of staff including deployment of the Claimant to Busia Water Sewerage Company Limited, the 5th Respondent herein was made solely by the 2nd and 4th Respondents upon taking over management of Kakamega Busia water supply.
41. That the Claimant was thus employed as an employee of the then Kakamega Busia water supply and not the 1st Respondent.
42. That in compliance with the provisions of *the Constitution* of Kenya, 2010 an agreement was entered into by the 1st Respondent and the 2nd Respondent and 4th Respondent to effect smooth transition of assets, liabilities and staff among others from the Lake Victoria North Water Services Board Kakamega – Busia water supply to the 2nd and 4th Respondents.
43. That earlier on the Governor of the 2nd Respondent had appointed one Fredrick Atwa the 6th Respondent as Acting Managing Director of Kakamega County Water and Sanitation Company



Limited, the 3rd Respondent herein following the separation of Kakamega, Busia water supply to from separate water services provision companies.

44. That following the decision of Kakamega and Busia counties to from separate water services provision companies, the Claimant was at the instigation of the 2nd and 4th Respondents, deployed to Busia Water and Sewerage Services, the 5th Respondent herein.
45. The 1st Respondent asserts that the Claimant was therefore deployed to the 5th respondent and thus ceased being an employee of the Lake Victoria North Water Services Board, Kakamega – Busia water supply an entity that no longer exists by dint of the 2010 Constitution that devolved water services to counties and became an employee of the 5th Respondent under the management of the County Government of Busia, the 4th Respondent herein.
46. The 1st Respondent reiterates that after the Claimant's cessation of employment with the Lake Victoria North Water Service Board, Kakamega – Busia water supply following the Claimant's receipt of the deployment letter dated 15/6/2016 asking him to report to the 5th Respondent which was his new station following dawn of devolution system of governance, the Claimant being a signatory of Lake Victoria North Water Services Board, Kakamega – Busia water supply was requested to sign cheques among other duties to facilitate the smooth transition from Lake Victoria North Water Service Board, Kakamega – Busia water supply to respective counties being the 2nd and 4th Respondents. That it is for that reason that the Claimant was paid on 28/9/2016 and not that he was an employee of the 1st Respondent.
47. The 1st Respondent asserts it is apparent that the Claimant is guilty of material non-disclosure and deceit.

Particulars of material non-disclosure and deceit on the part of the Claimant.

- a). Failing to disclose that he was aware of the transition from Lake Victoria north Water Services Board, Kakamega – Busia water supply to the respective counties being the 2nd and 4th Respondents herein.
 - b). Not disclosing to this Honorable Court that following his deployment he was now an employee of the 5th Respondent.
 - c). Not disclosing to this Honorable Court that he did not report to his new work station thus becoming the author of his own current quagmire.
 - d). Deceiving this Honorable Court that the 1st Respondent without any reasonable cause refused to assign the Claimant duties or resolve the deployment/transfer dispute.
 - e). Deceiving this Honorable Court and/or insinuating that the 1st Respondent ought to have resolved the purported deployment/transfer dispute.
 - f). Deceiving this Honorable Court and/or insinuating that the Claimant's contractual station was Kakamega as a matter of right.
 - g). Deceiving this Honorable Court and/or insinuating that it was mandatory that his transfer be within Kakamega.
 - h). Deceiving this Honorable Court and/or insinuating that the 1st Respondent was to assign him duties yet he had already been deployed.
48. 1st Respondent asserts that since the Claimant had ceased being an employee of Lake Victoria North Water Service Board, Kakamega – Busia water supply, the relationship between the Claimant and the



1st Respondent naturally ceased. That there is therefore no link or connection between the Claimant herein and the 1st Respondent. The 1st Respondent contends that the orders sought by the Claimant are incapable of being enforced against it.

2, 3rd and 6th Response dated 7th February 2023

49. This was vide witness statement of the 6th Respondent Fredrick Atwa who Stated that he was the 2nd Respondent's employee and serving as Acting CEO of Kakamega County Rural water and sanitation corporation.
50. The 2nd, 3rd and 6th Respondents assert that in light of water being a devolved function the Lake Victoria North Water Service Board, which was a national government entity, withdrew its service to the devolved government. This statement agreed to the facts of the case on the employment of the Claimant and transfer of services under the agreement between the Lake Victoria North Water Service Board and Kakamega and Busia counties. The witness stated the Claimant was deployed to the 5th Respondent and refused to report and that the 6th Respondent was appointed acting CEO of Kakamega county water service company.
51. That the Claimant could not continue acting as the Managing Director of the water company as the power to recruit was with the county government and not the Board which had earlier appointed the Claimant as acting Managing Director of the Kakamega Busia Water Supply. That the Claimant continued to offer service to the Board and not to the 3rd Respondent. That the Claimant was never employee of the 2nd and 3rd respondents.

4th Grounds of Opposition and Preliminary Objection

52. The 4th Respondent asserts that the amended claim has no basis in law as there is no privity of contract between the 4th and 5th Respondents on one hand and the Claimant.
53. That there is no cause of action against the 4th and 5th respondents.
54. That the Claim is frivolous, bad in law, an abuse of the Court process hence should be dismissed with costs to the Respondents.

The 5th Respondent's response to the amended statement of claim.

55. The 5th Respondent denied the claim in totality through its witness Ms. Akasiba. It asserted that despite the Claimant being deployed to Busia water and sewerage company limited (the 5th Respondent), the Claimant never reported to work and has never been under the employ of the 5th Respondent herein.
56. The 5th Respondent sought for dismissal of the e claim against it with costs.

Claimant's reply to the Respondents' response

57. The Claimant's reply sought to address the following questions:-
 1. Whether the transfer to the devolved governments for the Claimant who states was disabled was expeditious, efficient, lawful, reasonable and procedurally fair, and compiled with;
 - i. Section 31 (1) (2) of sixth schedule (Article 262) transitional and consequential provisions.
 - ii. Sections 4 and 152 (3) [Water Act](#) 2016.



- iii. Section 12 and 15 of persons with Disability Act
 - iv. Section 4 of Fair Administrations Actions Act
 - v. *Occupational Safety and Health Act* (OSHA)
 - vi. Laws of Contracts
 - vii. Provisions of *Public Service (values and principles) Act* No. 1A of 2015.
2. Whether Lake Victoria North Water Services Board Kakamega Busia water supply (LVNWSB-KBWS) was a different entity from 1st Respondent.
 3. Whether the Claimant was an employee of the 1st Respondent or LVNWSB-KBWS.
 4. Whether the Claimant was an employee of the 5th Respondent or the 1st Respondent.
 5. Whether the 1st Respondent breached the subsisting contract of employment.
 6. Whether the Claimant was physically disabled.
 7. Whether the Claimant performed his duties diligently that he earned respect and favor of the outgoing managing director.
 8. Whether there existed non-disclosure and deceit on the part of the Claimant.
 9. Whether 2nd 3rd 4th 5th and 6th Respondents were not party to breach of the Claimant's contract.
 10. Whether working conditions became intolerable and subjected the Claimant to extreme psychological and emotional torture.

Whether Lake Victoria North Water Services Board-Kakamega Busia Water Supply (lvnwsb-bws) was a different legal entity from 1st Respondent

58. The Claimant states that vide letter dated 9th December 2010 and 20th August 2010, WASREB directed 1st Respondent (licensee) to take over water services provision. Directions given were as follows:
 - i. The 1st Respondent (licensee) not to hand back operations to Western Water Company Ltd unless the company fully complied.
 - ii. That the 1st Respondent was the legal owner of all assets.
 - iii. That the management structure of water service provider (WSP) is retained but to report to the management team of the 1st Respondent.
 - iv. Operations recovered from Western Water Company Limited are run by the 1st Respondent.
 - v. Financial operations are reported separately, therefore the 1st Respondent (licensee) coined the LVNWSB-KBWS.
 - vi. As the board of directors of Western Water Company Ltd stood dissolved, the water service provision department of the 1st Respondent (KBWS) reports to the management team of the 1st Respondent.
 - vii. That the 1st Respondent to consequently hand over operations to a properly constituted/ registered (WSP).



- viii. that however, the 1st Respondent did not hand over operations to a registered WSP but retained the service provision under its own custody.
59. The Claimant submits that it provided under section 132 of WASREB water regulations, section 47 (1) (k) of Water Act 2002 (section 77 Water Act 2016), water services board (1st Respondent) shall contract a WSP who shall either be:
- a. A company registered under the companies Act and owned by private persons.
 - b. A company registered under the companies Act and formed by a local authority which was an undertaker within the terms provided under the repealed water Act cap 372.
 - c. A trust registered under the laws related to trusts.
 - d. A society registered under the societies act and owned by a community.
 - e. A natural person who shall be a water vendor.
60. The Claimant asserts that Lake Victoria North Water Services Board, Kakamega Busia water supply (LVNWB-KBWS) was not a registered legal entity under Water Act 2002 or 2016 and the accompanying regulations. That LVWSB-KBWS being a non-registered entity, never acquired a license to operate as autonomous WSP from the 1st Respondent under section 55 of Water Act 2002 or section 77 of Water Act 2016. That being a non-registered entity, LVNWS-HBWS never became a successor to Western Water Company Ltd.
61. The Claimant asserts that once the 1st Respondent repossessed its powers and functions from Western Water Company Ltd, all staff members of Western Water Services Company Ltd effectively became absorbed by the 1st Respondent. That in definition of terms under transfer deeds paragraph 2.4 define transferred staff”as employees of the Board who are taken over by county...” therefore all staff who transferred to the 2nd and 4th Respondents inclusive of the Claimant were employees of 1st Respondent(Appendix 10A).
62. That the Claimant was appointed acting Managing Director in letter dated 16th May, 2016, by the CEO of the 1st respondent. Paragraph 1 of the appointment reads thus “on behalf of the board of Lake Victoria North water service board, I am pleased to appoint you as the acting Managing Director, Kakamega Busia water supply, currently being managed by Lake Victoria North water service board, with immediate effect. This appointment will be valid until further communication from board of directors of LVNWSB” (Appendix 3)
63. That Paragraph 10 of the Claimant’s employment contract dated 4th February 2013 provides that performance rewards will be paid subject to approval of the board of the 1st Respondent(Appendix 4). The board of the 1st Respondent was responsible for appointment of staff, approval of major policy documents including the strategic plan, annual budgets, service charter, procurement plans, human resources policy and annual financial statements for audit. Revenue generated by LVNWSB-KBWS from government institutions including Kakamega State House, Kenya prison Kakamega and Busia, National Police Service, Kenya Defense Forces, Kenya Airport Authorities were directly paid to the main accounts of the 1st Respondent.
64. The Claimant submits that from the above facts 1st Respondent is estopped from denying the status of LVNWSB-KBWS as an administrative unit/department of the 1st Respondent. Reason Wherefore: Powers and functions of the 1st Respondent under Water Act 2002/2016 was efficient and economical provision of water service and not oversight over non-entity LVNWSB KBWS which never acquired



license to operate an autonomous entity from the 1st Respondent pursuant section 55 of the Water Act 2002. Consequently, the Claimant asserts that paragraphs 7E, 7G, 7H, 7I, 7J, 7L, 7M and 10 of the 1st Respondent response are inconsequential, null and void.

Whether the Claimant was an employee of the 1st Respondent or LVNWSB-KBWS

65. The Claimant asserts that he was an employee of the 1st Respondent whose work station was Kakamega Busia water supply headquarters, Kakamega.(c- Exhb Appendices 4- paragraph 8 of letter of appointment)That LVNWSB-KBWS was a non-entity without powers and incapable of hiring staff members or owning property, but an administrative unit of the 1st Respondent.
66. The Claimant asserts that he was recruited as Commercial and Finance Manager through a recruitment process carried out by the 1st Respondent's board of directors and the appointment letter signed by the CEO of the 1st Respondent. The Claimant's contract of employment was renewed by CEO with approval of board of directors of the 1st Respondent vide resolution MIN4-SBF-KBWS/8/10/2015(Appendix 5).That the Claimant's appointment dated 16th May, 2016 to Acting Managing Director position was done by CEO and approved by board of directors of the 1st Respondent. (Appendix 3).Correspondence dated 16/5/2016 was co-signed by Claimant and CEO of the 1st Respondent because they were both employees of 1st Respondent (Appendix 4B).
67. The Claimant submits based on the foregoing reasons the entity LVNWSB-KBWS held no legal capacity to employ or own property. The 1st Respondent is estopped from making reference to the non-existent entity LVNWSB-KBWS as an employer nor as owner of assets pursuant water Act 2002/2016. By this reason, the Claimant asserts that paragraphs 7B, 7C, 7H, 7I, 7J, 7L, 7M, 14, 15, 16 and 17 of response statement of 1st Respondent is inconsequential, null and void.

Whether the Claimant was an employee of the 5th respondent

68. The Claimant submits that the transfer process was never expedited to completion by the Respondents who rejected to place the claimant under a national or county government institution as articulated under section 152(3) of the water Act 2016 and sections 12 and 15 of persons with disability Act by rejecting to address his complaint. The Claimant asserts that he did not sign transfer to the 5th respondent as the transfer violated section 10(5) and 13 of employment Act 2007, violated paragraph 8, 16, and 19 of the existing employment contract, violated section 12 and 15 of persons with disability Act, violated section 6(1) and (2) of occupational health and safety Act, section 4 of fair administrative Actions Act, section 31(1) (2) of sixth schedule (Article 262) transitional and consequential provisions constitution of Kenya and was discriminative, unjust and procedurally unfair. Further, that the 2nd, 4th and 6th Respondents developed a matrix not provided under employment Act 2007 or human resources policy therefore unfairly disposing the Claimant to Busia.
69. The Claimant submits that by rejecting to address the Claimant's complaint vide letter dated 5th January, 2017 by 6th Respondent indicated that the Claimant was not an employee of the 3rd or 5th Respondents. (appendix 7)
70. The Claimant submits that the Respondents sidelined the Claimant without a station in violation of section 152 (3) of Water Act 2016 and section 12 and 15 of persons with disability Act. That paragraph 1 of appointment letter dated 16th June 2016 by 1st Respondent however states that ".....The appointment will be valid until further communication from board of directors of LVNWSB". The Claimant further asserts that he wrote on 2nd October 2016 indicating that he wanted to continue working after he was discriminated against by the devolved units. (appendix 3 & 16).



Whether the 1st Respondent breached Claimant's contact of employment.

71. The Claimant submits that there was unilateral change of terms and conditions of employment in violation of section 10(5) of the *employment Act* 2007. That no mutual agreement was reached between the Claimant, 1st Respondent and devolved units to make a contract. The Claimant relied on the decision in Kenya County Government Workers Union vs Wajir County Government and another (2020) e KLR, the Court held that the unilateral decision of an employer to effect to effect change (salary cut) without consulting staff offended the provision of section 10(5) of the *Employment Act* 2007.
72. That the 1st Respondent did not pay the claimant's salary effective September 2016 as the Claimant continued working while July and August salary was paid on 28th September, 2016 in breach of paragraph 9 of the *Employment Act*. (appendix 8A, 26, 26A. 26C, 26D. 26G)
73. The Claimant asserts that the unilateral transfer breached paragraphs 8, 16 and 19 of his employment contract which contract could only be varied by agreement in writing between the Claimant and 1st Respondent and not otherwise. Under section 31 of sixth schedule of *the Constitution* of Kenya, the claimant was acting as managing director but was however demoted from this position without the due process of the law. The sixth schedule (article 262 of *the Constitution*) Transitional and consequential provisions section 31 states thus
- (1) unless this schedule provides otherwise a person who immediately before the effective date, held or was acting in an office established by the former constitution shall on the effective date, continue to hold or act in that office under this constitution for the unexpired period if any, of the term of the person.
 - (2) subject to subsection (7) and section 24, a person who immediately before the effective date held or was acting in a public office established by law, so far as is consistent with this constitution , shall continue to hold or act in that office as if appointed to that position under this constitution.

However, the Respondents signed transfer deeds changing term and conditions of Claimant's employment.

74. That further, the Respondents exercised coercion and undue influence to force the Claimant transfer to Busia by:
- a. Stopping payment of his salary
 - b. Closure of his office (appendix 9)
 - c. Letter dated 6th July, 2016 by 6th Respondent having no such powers to instruct the Claimant without leave of the 1st Respondent and without having addressed complaint dated 27th June, 2016. (appendix 38)
 - d. Confiscation of the Claimant's work laptop and tablet that belonged to 1st Respondent (appendix 10)
 - e. Non-response and non-action to the complainant on transfer to busia.
 - f. Harassment, bullying, intimidation and discrimination by 2nd and 5th Respondent. (paragraph 148 – 150 below)



75. The Claimant asserts that these activities were intended to unduly influence/force through a transfer as the procedure was faulty and no agreement was sought prior to change of work station to Busia as well as change in the Claimant's position as acting managing director. In *Cantor Fitzgerald vs Bird* (2002 IRLR 867;HC) the High Court found in favour of two employees who the employer tried to force into accepting new contracts with adverse conditions using a combination of coercion, threats and bullying.
76. The Respondents declined to recognize the Claimant as person with physical disability therefore denied grant rights under section 12 and 15 (5) of person with Disability Act. In *Wilson Macharia- vs Safaricom PLC* (2021) e KLR the Court found that the Respondent failed to meet statutory obligation under section 12 of the Persons with Disability Act to ensure that there was reasonable accommodation of the persons with visual disability. The Petitioner was awarded Kshs. 6,000,000.00 in damages for discrimination.
77. That on 23rd September, 2016, the 1st Respondent signed transfer deeds with both 2nd and 4th Respondents respectively without seeking agreement and without complying with paragraph 19 of the subsisting contract of employment and without addressing complaint raised in violation of paragraph 7.1 of transfer deeds(Appendix 20A & 20B).That Respondents also failed to comply with paragraph 4.1 of terms of the transfer deeds that required that the Claimant is transferred
- “in the same terms and conditions of employment and his/their jobs shall be protected save for the disciplinary and or other reasons known in law.” (appendix 10A)
- That the Claimant raised complaint on deployment/transfer but respondents rejected to invoke paragraph 7.1 of the transfer deeds relating to dispute resolution. (appendix 10B)

Whether the Claimant was physically disabled.

78. The Claimant submits that the brought to the attention of all Respondents his physical disability resulting from a road traffic accident.(appendix 11a, 11e, 11f, 11g, 11h, 11h1 and 11i). That to date, the Claimant requires an additional surgery to remove implants in his limbs which has been curtailed by lack of funds.(appendix 11j).That Respondents had prior knowledge of the Claimant's physical disability having interacted with the Claimant in office and in joint committee meetings while the Claimant operated from a wheel chair.
79. That the Claimant was assessed disabled on 22 July 2017 by ministry of health Kakamega and registered as so by national council of persons with disability registration no. NCPWD/P/416249. (APPENDIX 11a, 11e, 11i). That Article 260 of *the Constitution* of Kenya defines “disability” to include any physical sensory, mental, psychological or other impairment condition or illness that has or is perceived by significant sectors of the community to have a substantial or long-term effect on an individual's ability to carry out ordinary day to day activities. The Claimant made available his medical records including medical assessment on physical disability to all Respondents with request to be retained in his contact station of Kakamega to continue treatment in Eldoret St. Luke's hospital. Moi referral, Cedar and Mediheal hospitals. (appendix 11D, 11F, 11G, 11H). That despite knowledge of the Claimant's physical disability, all Respondents rejected to recognize the Claimant as person with disability pursuant to Persons with Disability Act No. 14 of 2013.
80. In March year 2000: financial assessment officer Simon Ninsiima was awarded damages when he brought a claim under the disability discrimination Act (DDA). His former employers, Waltham Forest Council, failed to adopt his workplace to meet his needs. Mr. Ninsiima, who on wheelchair asked Waltham Forest Council to make adjustments for several years but his employer's constant



refusal and inaction led to long periods off work. He eventually resigned in March 1998. In *Horler vs Chief Constable of South Wales Police*, the employment tribunal found that the police had not met its duty to make reasonable adjustments because it had failed to consider alternative posts for a police officer who was unable to carry out frontline duties because of a disability. The police failed to justify the unfavourable treatment because the means adopted to achieve legitimate aim of providing effective policing – were not proportionate. Consequently, this amounted to discrimination arising from disability. In *Rookes vs Bernard* (1964) AC 1129, Lord Devlin . J. Discussing exemplary damages stated;

“ that first it is awarded against tortious intrusion or trespasses that are profit motivated i.e wrongful landlord evictions of their tenants or secondly where there is oppressive conduct by government agents and thirdly where the act of the defendants has caused distress and intolerable anxiety and to be awarded as a punishment.”

81. The Claimant asserts that in its response under paragraph 8, the 1st Respondent denies in toto to acknowledge the Claimant as a person with disability despite full knowledge of the same. (appendix 11a, 14, 15a, 15b, 16,17 18, 29, 27a, 27c, 27e)
82. That it is on the same ground that the 1st Respondent rejected to grant the Claimant’s rights under section 12 and 15 (5) of Persons with Disability Act. (appendix 16)
83. That the Claimant prays for the rule in *Rookes vs Benerd* (1964) AC 1129 apply for the Respondents to pay punitive damages for causing distress and intolerable anxiety to the claimant in their defenses. The 1st Respondent further made frivolous applications that were dismissed by the Court but which nevertheless delayed the suit for two a half years.
84. The Claimants asserted that by stopping the his salary and rejecting to address the complaint:
 - i. The Claimant cannot meet his medical expenses and to date has not undergone an operation to remove metal rail implants in his upper limbs.(appendix 11J)
 - ii. The Claimant could not pay his house rent
 - iii. The Claimant could not pay his insurance premiums (appendix 36 and 37)
 - iv. The Claimant could not pay school fees for his children and siblings
 - v. The Claimant could not pay for motor vehicle fuel to and from work
 - vi. The Claimant could not buy food
 - vii. That consequently, the Claimant disposed his plot in Kakamega and tractor to carter for his daily needs (appendix 49).This caused the Claimant a lot of psychological and emotional torture as he was unable to cater for himself and provide for his dependents.

Whether the Claimant performed his duties diligently that earned the favour and respect of the outgoing managing director

85. The Claimant submits that the recommendation by outgoing Managing Director dated 16th May 2016 cited the Claimant as honest, hardworking member of management team who continuously achieved his performance targets that had propelled LVNWSB-KBWS to success. (appendix 13c)
86. That the renewal of the Claimant contract of employment dated 9th October 2015 was informed by claimant’s work performance (appendix 5).



87. That between the date of his appointment and the date of transfer to devolved governments, LVNWSB-KBWS was awarded by the following institutions in commercial and finance areas;
- i. The water resource management authority awarded LVNWSB-KBWS as the best payer of abstraction charges. (appendix 12a)
 - ii. CPF pension scheme awarded LVNWSB-KBWS as best payer of current pension as well as arrears (appendix 12c)
 - iii. CPF recognized LVNWSB-KBWS as the best in customer response.(appendix 12f)
 - iv. That CPF recognized LVNWSB-KBWS for full settlement of pension arrears dating back 2008. (appendix 12b)
 - v. SNV award for being a model WSP in PPP
 - vi. WASREB recognized LVNWSB-KBWS for achieving 96% bills collection against the industry benchmark of 94% bills collection against the industry benchmark of 94% in the water sector reports of 2013/2014.
88. That these awards resulted from the claimant stewardship, diligence and efficiency in his area of appointment.
89. That the claimant received performance rewards in the year 2013, 2014 and 2015 for meeting his performance targets especially in the area of revenue collection and settlement debts.
90. That over duration of his employment, the claimant acted as the managing director on several occasions resulting from diligence and efficiency in performance of duties. (appendix 23(a) (b) (c) (d))
91. The claimant was not subject to any internal disciplinary proceedings nor investigation nor was he charged in Court of law for any misdemeanor, indiscipline, misappropriation or otherwise.
92. No evidence has been adduced to the contrary by the respondents to dispute the character of the claimant.
93. Therefore, discrimination administered against the claimant was not related to adverse performance or conduct but his disability, being non resident of kakamega and desire by the 6th respondent to illegally become MD.
94. That discrimination also resulted from the claimant withholding further payment to joint committee after the committee declined to provide documentation to support allowances amounting to over Ksh. 3 million that had already been paid. This action went against A236 constitution of Kenya.
95. Discrimination also arose from the fact that the claimant jointly with CEO signing instructions to KENHA to transfer Kshs. 42 million to bank accounts of 1st respondents.
- The claimant raised complaint of discrimination he was being subjected to but 1st respondent never initiated investigations. (appendix 17)

Whether there existed non-disclosure and deceit on the part of the Claimant.

96. The Claimant submits as follows:-



97. In his allegations of non-disclosure and deceit, the 1st Respondent fails to appreciate the Claimant's constitutional right under Article 47 for fair administration action. Section 4 of Fair Administration Action Act states:-

“4.

- (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) Every person has the right to be given written reasons for any administrative action that is taken against him.
- (3) where an administrative action is likely to adversely affect the rights or fundamental freedoms of any persons, the administrator shall give the person affected by the decision
 - (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
 - (b) an opportunity to be heard and to make representations in that regard;
 - (c) notice of a right to a review or internal appeal against an administrative decision where applicable.”

98. That all Respondents became administrators under section 2 of Fair Administration Actions Act and were under obligation to comply with provisions of the Fair Administration Actions Act.

99. The deployment/transfer was unreasonable, fraudulent, procedurally unfair, socially unjust illegal and unconstitutional thus discriminative. The 1st Respondent fails to appreciate that the end results of the devolution process under section 152 (3) of *WATER ACT* 2016 was to transfer all staff members to national or county government institutions but the claimant was sidelined without a station by Respondent's rejection to comply with legal procedures and provisions to deploy the Claimant appropriately in line with the applicable statute.

100. That to date the Claimant has not been deployed as required under section 152(3) of *Water Act* 2016.

101. That the following correspondences went not responded to or acted upon:-

- i. Letter dated 9th June 2016 to the 1st Respondent requesting to be deployed to contract station of Kakamega.
- ii. Complaint dated 27th June 2016 to 3rd and 5th Respondent and copied to 1st respondent (appendix 15A)
- iii. Letter dated 22nd September 2016 being a reminder of the deployment complaint (appendix 15B)
- iv. Letter dated 1st September 2016 to 1st Respondent on closure of the Claimant's office. (appendix 9)
- v. Letter dated 2nd October 2016 to CEO 1st Respondent the Claimant requesting to remain as employee after the 2nd 3rd 4th 5th and 6th Respondents maintained intention to discriminate against the Claimant(appendix16).



- vi. Correspondence dated 13th December 2016 to the 1st Respondent requesting to be informed of institutional set up within the transfer process mandated to resolve staff complaints following discrimination against the Claimant (appendix 17 and 31).
 - vii. Letter dated 27th February 2017 to CEO 1st Respondent requesting for information on the devolution process under A35 of *the constitution* (appendix 18).
 - viii. Letter to KAKAMEGA COUNTY PUBLIC SERVICE BOARD dated 25th March 2017 in response to investigation ordered by Public Service Commission of Kenya (appendix 19).
 - ix. Letter dated 26th June 2017 to CEO 1st Respondent seeking information on status of the employment contract. (appendix 20).
102. The Claimant submits that further, the Respondent(s) failed to recognize paragraph 18 of transfer deeds that provides thus, “this agreement and all matters arising from it and any dispute resolutions referred to below shall be governed by and construed in accordance with Kenyan law notwithstanding the conflict of law provisions and any other mandatory law provisions” (appendix 20A – page 9 of 9 of transfer deeds)
103. That in claiming deceit and non-disclosure, the 1st Respondent remains non-repentant ignorant or acts in disregard of the numerous contractual, legal and constitutional violations committed that renders the deployment unconstitutional, illegal, unjust, procedurally unfair, fraudulent, discriminative, prejudicial, and further made in total violation of the Claimant’s contract of employment, provisions of *employment Act* 2007, persons with disability Act, occupational health and safety act and the transitional clause in *the constitution* of Kenya and violated Articles 10, 21(3), 27, 28, 29(d), 35, 41, 47, 54,(1) (a), 232 and 236 of *the Constitution* of Kenya 2010.
104. In claiming that the Claimant deceived the Court that it was mandatory that he is transferred to his contract station of Kakamega, the Respondent is ignorant or disregards the principles of novation of contract that requires;
- a. That all three parties must be involved in the novation, the transfer, the county party and the transferee, all must agree to the new terms and make a contract.
 - b. That terms must remain as original contract and no change is effected in terms and conditions of the contract subsequent to the transfer that substantially varies rights and obligation of parties.
 - c. The 1st Respondent further rejects or disregards the provisions of paragraph 4.1 of transfer deeds that states “ staff members’ contracts will be transferred in same terms and conditions of employment and their jobs will be protected” (Appendix 4.1 page 5 Of 9 of transfer deeds).
105. That in citing non-disclosure and deceit, the 1st Respondent disregards the provisions of *Public Service (Values and Principles) Act* No. 1A of 2015 (values and principles) under Article 232 of *the Constitution* of Kenya that states:-

“7.

- (1) public service shall ensure that public services are provided:
 - a. Promptly
 - b. Effectively



- c. Impartially
- d. Equitably
- (2) the provision of public services is not prompt where there is unreasonable delay.
- (3) for the purpose of this section, “unreasonable delay” includes failure by a public officer to provide a public service within the period that maybe provided for in the service charter of the public institution in which he or she is serving.
- (4) the provision of public services is ineffective if –
 - a. there is unreasonable loss
 - b. public complaints against a public officer are made regarding the provision of public services or
 - c. public grievances against a public institution are made regarding the quality of it’s services and a public officer is found culpable of the loss or the complaint or grievance against the officer is found valid, upon complaint pursuant to section 13 of this Act.
- (5) the provision of public services is not impartial or equitable if:
 - a. a public officer discriminates against a person or a community during the provision of public services or
 - b. a public officer refuses or fails to give accurate information during the provision of public services.”

106. In citing non-disclosure and deceit, the Respondent(s) disregards implied duty of trust and confidence of the employer 1st Respondent in contract of employment which the said Respondent violated and failed in his duty- of care:

- a. That the 1st Respondent will give the Claimant reasonable support to do his job.
- b. That the Respondent will provide the Claimant an opportunity to raise grievances.
- c. That neither party would without reasonable cause, act in away that is calculated to or likely to destroy the other party’s trust and confidence in them.
- d. That the 1st Respondent will protect the Claimant from bullying, harassment and threats by outsiders.
- e. That the Respondent will not discriminate against the Claimant.
- f. The Respondent will provide safe working environment for the Claimant.
- g. The Respondent will resolve any dispute that arise in the course of employment.



107. That notwithstanding the implied duty, the 1st Respondent failed in his duty:
- a. To pay the Claimant salary making it very difficult for the Claimant to do his work well as he could not meet his financial needs.
 - b. To alternatively institute dialogue with both 2nd and 4th Respondent for mutual agreement to transfer the Claimant to his contract station or the retain the claimant thus pay his salary.
 - c. Allowed the 6th Respondent to confiscate the Claimant's work laptop and tablet.
 - d. Allowed the 6th Respondent to close the claimant's office
 - e. Allowed the 2nd and 6th Respondents to threaten, bully, harass and discriminate against the Claimant.
 - f. Allowed the 6th Respondent to close his office to prevent the Claimant from performing his duties.
 - g. Rejected to grant the Claimant's rights under section 12 and 15 (5) under persons with disability act.
 - h. Rejected to give the Claimant latest pay slip and employer letter to facilitate Claimant application for tax exemption to KRA (Appendix 21B)
 - i. Rejected or ignored to initiate dialogue to resolve complaint raised on his position and work station.
 - j. Rejected or ignored to initiate investigations after the Claimant had raised complaint on discrimination.

Reasons wherefore the Claimant submits that at no material time has he deceived or failed to disclose to this Honourable Court or any other party any material facts.

Claimant's Reply to the 5th Respondent's Response

108. That the deployment letter dated 15th June, 2016 and addressed to the Claimant states:-
- “following separation of LVNESB-KBWS and taking over by county governments of Kakamega and Busia, this is to inform you that you have been deployed from LVNWSB-KBWS to Busia Water And Sewerage Company Limited. With effective 1st July, 2016. Your terms and conditions of employment shall remain the same”(appendix 24).
109. That terms and conditions of employment in the transfer letter dated 15th June 2016 relates to the terms and conditions of employment by 1st Respondent that were subject of transfer to 5th respondent. (Appendix 4).
110. That therefore the 5th Respondent is conversant with contents of paragraph 3, 4, 5, 6 and 7 of the amended statement of claim and is the reason the acting MD of 5th respondent signed transferring the Claimant to 5th respondent.
111. That 4th and 5th Respondents were represented by David Erulu, Innocent Fea Emasse Oluku and Prof. Christine Mango in the joint committee. The joint committee whose mandate among others included analysis of all particulars of staff transferred to county WSP. That therefore the 5th respondent is not a stranger to terms and conditions of employment of the Claimant.



112. Paragraph 8 of the response notice claims that 5th Respondent is unaware of claimant's deployment to Busia. This is despite the fact that Ag MD of the 3rd and 5th Respondents jointly signed deployment letter to effect.
113. That further, the Claimant brought the same to the attention of Ag MD of 5th respondent through correspondences dated 27th June 2016 and 22 September 2016. (appendix 15a, 15b, 15c, 24).
114. The Claimant further complained to Busia county public service board, respective CEC and Chief Officer. (Appendix 17, 25, 27E, 31 & 39).
115. That paragraph 9 of response by 5th Respondent states that the Claimant never in fact reported to Busia. However, the same Respondent does not disclose that they did not respond or address complaint by the Claimant.
116. Complaint to Ag MD, chief officer, CEC (County Executive Committee Member) and county public service board Busia were never addressed or responded to. (appendix 15a, 15b, 15c, 25).
117. That section 8 of Occupational Health and Safety Act (OSHA) provides that:-
- “ 1. An occupier shall not dismiss an employee, injure the employee or discriminate against or disadvantage an employee in respect of the employee's employment or alter the employee's position to the detriment of the employee by reason only that the employee –
 - a. Makes a complaint about a matter which the employee considers is not safe or is a risk to his health.”
118. That section 14 (2) of Occupational Health and Safety Act provides that,
- “an employee who has left work place, which the employee has reasonable justification to believe presents imminent and serious danger to life and health shall not be dismissed, discriminate against or disadvantaged for such action by the employer”
119. The transfer further violated the Claimant's legitimate expectations:-
- i. Under section 31 (1) and (2) of sixth schedule (article 262) transitional and consequential provisions.
 - ii. The Respondent further violated the Claimant's legitimate expectation under paragraph 4.1 of the transfer deeds that terms and conditions will remain same. His work station was changed to Busia in violation of section 10(5) of *Employment Act* 2007. (appendix 10A).
 - iii. The transfer violated the Claimant's legitimate expectation that he would be deployed in Kakamega to continue his treatment in Eldoret pursuant section 12 and 15 of persons with disability act.
 - iv. The transfer violated the Claimant's legitimate expectation that administrative action relating to his transfer/deployment would be expeditious just procedurally fair but which was violated.
 - v. The transfer violated the Claimant's legitimate expectation that he will not be discriminated but he was however. 6th Respondent avers that a matrix was used to transfer the Claimant to Busia. The matrix used is not provided for under *Employment Act* 2007 or human resources policy.



- vi. That despite knowledge by 5th Respondent that a matrix not provided for under the law was used, the said 5th Respondent proceeded to sign the transfer.
 - vii. The transfer violated the Claimant's legitimate expectation that he would be deployed in Kakamega to continue his treatment in Eldoret.
 - viii. The transfer violated the Claimant legitimate expectation that he would be accorded rights under section 12 and 15 of Persons with Disability Act, but which he was denied.
120. The 5th and the rest of the Respondents did not give written explanation why terms of employment were ,changed in violation of paragraph 4.1 of transfer deeds required under Fair Administration Actions Act.
 121. In Cantor Fitzgerald v Bird (2002 IRLR 867; HC) the High Court found in favour of two employees who the employer tried to force into accepting new contracts with adverse conditions using a combination of coercion, threats and bullying.
 122. That paragraph 11 of 5th Respondent's response on Claimant's work for 5th Respondent on behalf of 1st Respondent is evidenced by copies of payment vouchers and cheques endorsed by the Claimant on behalf of 3rd and 5th Respondents during and after transfer of water services. (appendix 26, 26a, 26b, 26c, 26d, 26g, 26h)
 123. That paragraph 12 and 17 of the response by 5th Respondent, the Claimant was paid his July and August salary on 28th on September 2016 and to date has not been paid again, laptop confiscated and his office closed. This made it difficult for the Claimant to work efficiently. (appendix 8a, 9 &10)
 124. The Claimant required his salary to pay his medical bills, pay rent, buy food pay school fees for his children², buy motor vehicle fuel to and from work pay insurance premiums among others. Without a salary, life became unbearable as the Claimant failed to provide for himself and his family while suffering from disability for lack of funds to pay medical bills.
 125. This caused the Claimant un-tolerable suffering that to date the Claimant has not undergone an operation to remove the metal rails implants in his upper limbs, his children and siblings missed school and colleges as the Claimant could not raise funds in time. This placed the Claimant under severe psychological and emotional torture for failing as head of the family without alternatives as the Claimant relied on his employment. (appendix 11J)
 126. That the Claimant resorted to borrowing from microfinances whose high interests became a problem for the Claimant to repay the loans and consequently had to sell his plot in Kakamega and tractor to make ends meet. (appendix 49)
 127. That paragraph 14 questions efficiency and diligence of the Claimant. The letter by the outgoing managing director clearly articulated so. (appendix 13c)
 128. The Claimant's contract of employment was renewed based on his past performance (appendix 5)
 129. That further the 1st Respondent could not have appointed an incompetent person to manage its core function of efficient and economical water supply as acting managing director (appendix 3)
 130. That no evidence exist to the contrary to dispute the conduct of the claimant and his performance.
 131. In paragraph 18 of the response, the 5th Respondent feigns ignorance over the Claimant's medical conditions. This is despite letters dated 27th June 2016 and 22nd September 2017 to Ag MD of 5th Respondent clearly disclosed the facts. (appendix 15a, 15b)



132. Further 5th Respondent's representatives to the joint committee, David Erulu innocent Eluko and Prof. Christine Mango as well as acting MD (Isaiah Andati) met the claimant in joint committee meetings and in office and were aware of the claimant's disability. (appendix 15a, 15b, 15c)
133. Paragraph 19 of the 5th Respondent's response denies having breached the Claimant's contract of employment. The issue in question is;
- i. Whether the 5thR complied with section 4 and 152 (3) of *Water Act* 2016 being implementer/ administrator of government policy on devolution of water service to ensure claimant's contract of employment was preserved.
 - ii. Whether the Respondent complied with section 12 and 15 of Persons with Disability Act 2012.
 - iii. Whether the Respondent complied with section 4 of the Fair Administration Actions Act.
 - iv. Whether the Respondent's complied with principles under public service act.
 - v. Whether the Respondent complied with sections 6 and 8 of OSH Act.
 - vi. Whether the transfer complied with the principles of novation/transfer of contracts.
134. That by violating the said provisions of the law, the 5th Respondent became party to breach of the claimant's contract together with the rest of the Respondents.
135. Under paragraph 20, 5th respondent denies violating Claimant's constitutional rights. However the following can be deduced from the Respondents behavior,
- i. Breach of various legal provisions under section 152(3) *Water Act* 2016, section 4 of Fair Administrative Actions Act, section 5 and 10(5) *Employment Act* 2007, OSH Act, section 12 and 15 of Persons with Disability Act, violations under public service act(sic), all violated A10 of *the Constitution* of Kenya.
 - ii. Rejection by Respondents to recognize the claimant as disabled amounted to discrimination based on disability which violated Articles 20, 21(3), 27(4) and (5), 28, 29(D) & (F), 41(2)(A) (B), 47 and 54.
 - iii. Jointly together with 3rd Respondent use of matrix to transfer the Claimant to Busia was procedurally unfair and discriminative, socially and violated Article 47 of *the Constitution* of Kenya (paragraph 9 of 6th Respondent witness statement)
 - iv. Failure to respond or act on complaints raised violated section 4 of Fair Administration Action Act under A47 and principles of public service under public service act(sic) and Article 232 of *the Constitution*.
 - v. Failure to respond to the Claimant's correspondences, rejection to address complaints also violated provisions of Article 41 to fair remuneration and reasonable working conditions.
 - vi. Failure to grant rights under paragraph section 12 and 15 of persons with disability violated Articles 10, 21(3), 27(1) (4) (5) and 54.

Claimant's Reply to 2nd, 3rd and 6th Respondents' Response

136. Vide gazette notice 247, Constitution of Kenya, the County Government Act (No. 17 of 2012) the governors of 2nd and 4th Respondents and chairman of the 1st Respondent formed a joint committee to



- oversee transfer of water service to the county governments of Kakamega Busia and Nandi (appendix 20A, 20B & 22).
137. That members of the joint committee were constituted from three counties and the 3rd and 5th Respondents.
 138. That some members appointed by the 2nd Respondent were also board members of the 3rd Respondent. (appendix 22&29)
 139. The 2nd and 4th Respondents formed the 3rd and 5th Respondents' respectively pursuant section 77 of Water Act 2016.
 140. That 6th Respondent was appointed board member of 3rd Respondent vide Kenya gazette notice no. 737 dated 6th February 2015. (appendix 29)
 141. That under Article 10 of the Constitution of Kenya, the Respondents were under obligation to apply the following in the transfer process:-
 - i. The rule of law
 - ii. Human dignity, equity, social justice,
 - iii. Inclusiveness, equality, human rights and discrimination;
 - iv. Good governance, integrity, transparency and accountability.
 142. The decision to appoint the 6th respondent as acting managing director of 3rd respondent violated the principles and national values of good governance practices, transparency and accountability provided under Article 10 of the constitution of Kenya.
 143. That under paragraph 6 of the response 2nd 3rd and 6th Respondents rejected to acknowledge that the claimant was physically disabled which amounted to discrimination based on disability. Appendix 11a, 11e, 11i).
 144. That the Claimant made complaints to Ag MDs, respective county chief officer, respective county executive committee members (CEC) and county public service board. That these complaints were never addressed except the 6th Respondent wrote to reject the complaint. Appendix 15a, 15b, 27a, 27b, 27c, 27e, 27f).
 145. That in his complaint the Claimant was clear of his medical condition resulting from a road traffic accident. (appendix 15a, 15b, 17, 19, 25)
 146. That under paragraph 8, 2nd, 3rd and 6th Respondents rejects the Claimant having worked for the 3rd Respondent. Payment vouchers and cheques jointly endorsed by the Claimant, the 6th Respondent and Michael Ogol, technical manager proves beyond reasonable doubts that the Claimant and 6th Respondent worked together. (appendix 26, 26a, 26b, 26d, 26g, 26h)
 147. That under paragraph 9 of 2nd 3rd and 6th Respondents deny bullying, harassment, intimidation, and discriminating against the Claimant. The Governor of Kakamega county through letter dated 10th June 2016 wrote to the Chairman of the 1st Respondent ordering takeover of operations in total disregard of the ongoing legal procedure to transfer the operations. (appendix 28AA)
 148. That the 6th Respondent used crooked means to oust and eject the Claimant from his office so that the said 6th Respondent can take over as the claimant who was physically disabled.



149. That the office occupied by the Claimant was one and the same that was invaded and taken over for occupation by the 6th Respondent after ouster of the Claimant.
150. That after ouster of the Claimant from his office as Ag MD, the Claimant moved to his former office occupied as commercial and finance manager. That 6th Respondent moved to further close this office to oust the Claimant eventually sending the said claimant out of work (appendix 9).
151. The 6th Respondent closed the Claimant's office on different occasions, confiscated the Claimant's laptop and tablet (refer to paragraph 148 – 150 above).
152. Resulting from the Governor's instructions for forceful takeover of water service provision, the 6th Respondent embarked on harassment, bullying, intimidation and discrimination of the Claimant who was operating on a wheel chair. Appendices 7, 10, 38, 28a, 28c, 28d, 28e.)
153. The Claimant reported the following cases to various authorities;
- i. Between 10th and 19th June 2016 the 6th Respondent repeatedly sent series of messages to the Claimant to effect that he resigns from his position as acting managing director which was reported to County Commissioner, Police, OB8/20/2/2017, CEO and chairman 1st Respondent.
 - ii. That on 19th June 2016, the 6th Respondent sent the Claimant a message not to report to work if he did not resign.
 - iii. That the effect to the message was devastating to the Claimant who was operating from a wheel chair.
 - iv. The Claimant reported to county commissioner requesting for security and Chairman and CEO 1st respondent and the police abstract OB8/20/2/2017 appendix 28A
 - v. That on 13th June 2016, the 6th Respondent stormed the LVNWSB premises with goons and daily nation reporter for forceful takeover of services under circumstances that put the security and health of the Claimant under severe danger as the Claimant had no realistic chances of escaping as the situation threatened to get out of hand.
 - vi. That the Claimant who was in wheelchair bound was assisted to escape through back door of the office he occupied by the one Ochieng Odueso who was the driver to the Claimant.
 - vii. That therefore the nation media reported the forceful takeover in the daily nation newspaper of 14th June 2016. Appendix 28b.
 - viii. On 14th June 2016, board members of KACUWASCO visited the Claimant office and demanded that the Claimant quits to allow Fredrick Atwa to take over, which the Claimant declined and referred them to the CEO 1st Respondent. This was reported to CEO 1st Respondent by the Claimant in his status report dated 28th June 2016. Appendix 28.
 - ix. That the 6th Respondent closed the Claimant's office on 15th June 2016 and it took the intervention of the county commissioner to have the office re – opened by the 6th Respondent on 17th June 2016. This was reported to the CEO 1st Respondent through status report on 28th June 2016. Appendix 28)
 - x. That 6th Respondent further closed the Claimant's office again on 20th June 2016. He further closed the gates to the compound that company motor vehicle could not go out to pick the Claimant. Appendix 28.



- xi. That on 6th July 2016, 6th Respondent wrote to Claimant ordering him to move to Busia. This was despite the fact that he had no such powers to effect(appendix 38).
154. That according to section 34(1) of *Leadership and Integrity Act* 2012,
“a public officer cannot bully another person”.
- Sub section 2 defines bullying to include repeated offensive behavior which is vindictive, cruel, malicious or humiliating and is intended to undermine a person. Further, section 5(3) of *Employment Act* 2007 states that
“no employer shall discriminate directly or indirectly against an employee or prospective employee or harass an employee or prospective employee...”
155. The behavior of the 6th Respondent was unwarranted and had the purpose of undermining and violating the dignity of the claimant and creating a hostile degrading, humiliating and offensive environment. Further the mistreatment had caused mental and psychological for the claimant who was operating from a wheel chair besides pain he was from injuries he was suffering from.
156. In *Yeboah vs Crofton* 2002 IRLR634, the harasser was ordered to pay Mr. Yeboah 45,000 ponds compensation for racial discrimination including 10,000 pounds aggravated damages. It was held that even if the employer was not vicariously liable because he had taken such steps as were reasonably practicable to prevent the employee from. The act in question, the tribunal was entitled to hold that the employee personally liable for knowingly aiding the unlawful act by the employer.
157. In the case of *Go kidz go vs Bourdouane* (EAT 10 September 1996) that appeal tribunal affirmed that an employer has responsibility to prevent acts of sexual harassment by non-employees on employees in the course of their duties once such acts of harassment have been brought to the employer’s attention. In a similar case of *Burton and Rhule v De vere hotels* (EAT 1996 IRLR 596) the appeal tribunal affirmed the racial equivalent in that the employer has a duty to protect employees from racial harassment by non-employees whilst in the course of fulfilling their duties.
158. That paragraph 10 of the response assertion that the transfer was done by the 1st Respondent was misrepresentation of facts. Transfer was executed by parties to the gazette notice, the 1st Respondent (chairman of the board of directors, Joseph Langat), 2nd Respondent governor/CEC and its assignee 3rd Respondent and 4th Respondent governor/ CEC- and its assignee 5th Respondent who were jointly administrators /implementers of public policy on devolution of water service. (appendix 20a, 20b, 22)
159. That paragraph 15 of the 2nd 3rd and 6th response statement disputes that the claimant continued working for 3rd and 5th Respondents. The Claimant endorsed payments for UPC projects for Kakamega and Busia(appendix 26, 26a, 26b, 26d, 26g, 26h)
160. That based on the above submissions, the Claimant has sought Court intervention to enforce his rights under *Employment Act* 2007, *Persons with Disability Act*, *Fair Administration Actions Act*, *Occupational Health and Safety Act*, *Leadership and Integrity Act*, *Water Act* 2002/2016, public service act(sic) and Constitution of Kenya 2010 which was violated by the Respondents.
161. The Claimant asserts that in transfer of water service to devolved governments, the Respondents are guilty of violating the following provisions;
- i. Section 31 (1) (2) of sixth schedule (article 262) transitional and consequential provisions
 - ii. Section 4 and 152(3) *Water Act* 2016



- iii. Section 12 and 15 of Persons with Disability Act
 - iv. Section 4 of Fair Administrative Actions Act
 - v. Occupation Safety and Health Act (OSHA)
 - vi. Laws of contracts
 - vii. Provisions of Public Service (Values and Principles) Act no. 1a of 2015
 - viii. Subsisting contract of employment
162. From the above averments, there was gross violation of contract of employment, constitutional and legal provisions which adversely affected claimant's statutory and constitutional rights.
163. That the Respondents were the joint administrators to the process and are jointly culpable for the violations.
164. The Claimant has sought Court intervention to enforce his rights base on the above grounds, applications seeking dismissal of the suit by respondents should be rejected by this honorable Court.

Hearing

Claimant's Case

165. The Claimant's case was heard on the 27th April 2023 ,30th May 2023 and 4th July 2023 with the Claimant as only witness in his case testifying on oath. He produced as his evidence his consolidated bundle of documents and was cross examined by counsel for the Respondents.

Respondents' case.

166. The 2,3, and 6th Respondents' case was heard on the 4th July 2023 with Fredrick Atwa as the witness of fact testifying on oath and adopting his witness statement dated 7th February, 2023 as his evidence-in-chief. He was cross- examined by counsel for the 4th Respondent, 1st Respondent, 5th Respondent and the Claimant in person.
167. The 5th Respondent's case heard same date with one witness of fact Sarah Patrick Akasiba who testified under oath and adopted her witness statement dated 15th March 2023 as her evidence- in – chief and produced documents of the 5th Respondent. She was cross-examined by Counsel for the 1st Respondent and the Claimant.
168. The 1st Respondent's case was heard on the 27th July 2023 with one witness of fact CPA Antony Chebulobi Kisaka who testified on oath and adopted his witness statement dated 15th May 2023 as his evidence- in-chief. The witness produced documents of the 1st Respondent (list of 8th December 20221st Respondent's exhibits 1-12 and additional documents under list of 15th March 2023 being 1st Respondent's exhibits 13-14) .The witness was cross-examined by Counsel for the 2,3 and 6th Respondents, the 4th respondent and the 5th Respondent and the Claimant .
169. Counsel Wambura informed the Court that the 4th Respondent relied on their Notice of Preliminary Objection dated 20th March 2023 and grounds of opposition dated 20th March 2023 as defense of the 4th Respondent and did not call any witness.



Written Submission

170. After conclusion of the hearing the Court issued directions on filing of written submissions. The parties complied. The Claimant's written submissions were received in Court on the 23rd August 2023. The 2,3rd and 6th Respondent's written submissions were received in Court on the 31st October 2023. The 1st Respondent's written submissions were received in Court on the 1st November 2023. The 4th Respondent's written submissions were received in Court on the 14th August 2023. The 5th Respondent submissions were received in Court on the 11th October 2023.

Determination

Issues for determination

171. The Claimant addressed the following issues in his submissions:-
- a. Whether the Lake Victoria North Water Services Board- Kakamega Busia Water supply was a different legal entity from 1st Respondent
 - b. Whether Lake Victoria North Water Services Board- Kakamega Busia Water supply was a registered legal entity qualifying for license to operate as a WSP
 - c. Whether the Claimant was an employee of the 1st Respondent or KBWS
 - d. Whether the Respondents were aware the Claimant was involved in a road accident and was physically disabled and attending treatment in Eldoret.
 - e. Whether claimant's transfer to Busia complied with legal, contractual and procedural threshold for valid transfer of contract
 - f. Whether the 1st Respondent breached the Claimant's contract of employment
 - g. Whether the Claimant's appointment ceased on devolution of services
 - h. Whether the Acting Managing Director position was valid for transfer with the rest of the Claimant's terms of contract.
 - i. Whether the county governors possessed the power of appointing managing directors under the transitional and consequential provisions under Article 262
 - j. Whether the 2nd and 4th Respondents were liable for the Claimant's failure to transfer pursuant to section 152(3) of the *Water Act* 2016
 - k. Whether the Claimant suffered work place discrimination
 - l. Whether the Claimant was accorded rights under Persons with Disability Act
 - m. Whether the partisan composition of the joint committee prejudiced treatment of the claimant in the transfer process,
 - n. Whether the respondents complied with the procedure for compliant resolution under *Public Service (Values and Principles) Act*
 - o. Whether the 1st Respondent violated Claimant's right to information under Article 35 of *the Constitution*.
 - p. Whether the Claimant was requested to endorse payment during the transition period.



- q. Whether the claimant worked under intolerable conditions
 - r. Whether the Respondents lacked powers and authority to address the Claimant's complaint and dispute.
 - s. Whether the deployment of the Claimants to the 1st Respondent was an impossibility
 - t. Whether the Claimant was bullied, harassed threatened and intimidated.
 - u. Whether the Claimant ought to be reinstated to employment.
 - v. Whether the claimant is entitled to the costs of this suit.
172. The 1st Respondent addressed the following issues in its written submissions.
- a. Did the 1st Respondent breach the Claimant's contract of employment dated 21st January 20123 which was later on renewed for three further years
 - b. Is the Claimant entitled to the prayers sought as against the 1st Respondent
 - c. Who is to bear the costs of this claim.
173. The 2nd, 3rd and 6th Respondents addressed the following issues:-
- a. Whether the Claimant was an employee and who was his employer?
 - b. Whether the deployment of the Claimant was legal and within the provisions of the law.
 - c. whether the deployment of the employee violated any of its rights and if yes who was liable.
 - d. Whether the Claimant is entitled to compensation.
174. The 4th Respondent addressed the merits of the case.
175. The 5th Respondent addressed the following issues :-
- a. Employment status of the Claimant.
 - b. Absconding.
 - c. Cause of action against the 5th Respondent.
176. The Court having heard the case and read the pleadings was of the opinion that the following are the issues for determination in the suit:-
- 1. Whether the Claimant was an employee of the 1st Respondent.
 - 2. Whether the Claimant was eligible for deployment.
 - 3. Whether the Claimant's transfer to the 5th Respondent was lawful.
 - 4. Whether the 1st Respondent violated the Claimant's rights to information and the question of jurisdiction of the Court, whether the Claimant was discriminated against and whether the Respondents violated the Claimant's right to resolution of dispute.
 - 5. Whether the Claimant is entitled to reliefs sought



Issue 1. Whether the Claimant was an employee of the 1st Respondent

Claimant's case

177. The Claimant asserted that he was an employee of the 1st Respondent whose work station was Kakamega Busia water supply headquarters, Kakamega.(Appendices 4- paragraph 8 of letter of appointment).
178. That LVNWSB-KBWS was a non-entity without powers and incapable of hiring staff members or owning property, but an administrative unit of the 1st Respondent.
179. The Claimant was recruited as commercial and finance manager through a recruitment process carried out by the 1st Respondent's board of directors and the appointment letter signed by the CEO of the 1st Respondent.
180. The claimant's contract of employment was renewed by CEO of the 1st Respondent with approval of board of directors of the 1st Respondent vide resolution MIN4-SBF-KBWS/8/10/2015. (Appendix 5)
181. That the Claimant's appointment dated 16th May, 2016 to Acting Managing Director position was done by CEO and approved by board of directors of the 1st respondent. (Appendix 3)
182. Correspondence dated 16/5/2016 was co-signed by Claimant and CEO of 1st Respondent because they were both employees of 1st Respondent (Appendix 4B).

Response by 1st Respondent

183. That the 1st Respondent is a state Corporation, whose mandate among others was to provide oversight over Kakamega-Busia water supply.
184. That the Claimant was not an employee of the 1st Respondent but an employee of Lake Victoria north water services board, Kakamega – Busia water supply serving as the commercial and finance manager from 21/1/2013 to 4/02/2016 and his contract was renewed for 3 years up to 3/2/2019.
185. That at the time of appointment and renewal of the Claimant's contract, Kakamega – Busia water supply formerly known as Western Water Company Limited had been placed under oversight of the 1st Respondent herein by the regulator, water services regulatory board following mismanagement and governance issues by Western Water Company Limited.
186. The 1st Respondent pleaded that following the promulgation of *the Constitution* of Kenya, 2010 County Public Works and services including water and sanitation services were devolved to the counties.
187. That this oversight and agency relationship between the 1st Respondent (A parastatal and principal) and Kakamega – Busia water supply (agent) ceased by operation of the law pursuant to the 2010 Constitution.
188. That as a result of devolution of water and sanitation services to the counties, the 2nd and 4th Respondents demanded from the 1st Respondent immediate separation (de-clustering) of Kakamega – Busia water supply and transfer of it's management to their respective counties.
189. That the 2nd and 4th Respondents formed a joint committee mandated to oversee smooth transition of water and sanitation function from Lake Victoria north water services board, Kakamega – Busia water supply including the mode of sharing assets, liabilities and staff.



190. That the decision to share existing Lake Victoria north water services board, Kakamega Busia water supply assets, liabilities and transfer of staff including deployment of the claimant to Busia water sewerage company limited, the 5th Respondent herein was made solely by the 2nd and 4th Respondents upon taking over management of Kakamega Busia water supply.
191. That the Claimant was thus employed as an employee of the then Kakamega Busia water supply and not the 1st Respondent.
192. That in compliance with the provisions of *the Constitution* of Kenya, 2010 an agreement was entered into by the 1st Respondent and the 2nd Respondent and 4th Respondent to effect smooth transition of assets, liabilities and staff among others from the Lake Victoria north water services board Kakamega – Busia water supply to the 2nd and 4th Respondents.

Response by 5th Respondent

193. The 5th respondent avers that the contract of employment dated 21st January 2013 was between the Claimant and Lake Victoria North Water Works Development Agency (formerly Lake Victoria North Water Services Board), the 1st respondent herein and not between the Claimant and Busia water and sewerage company limited, the 5th respondent herein.

Decision

194. That the letter of appointment of the Claimant dated 21st January 2013(C- Exhibit marked appendix 4) was authored by the CEO of Lake Victoria North Water Services Board (letter head) with place of work as Kakamega Busia Water Supply Headquarters Kakamega. It was a contract for 3 years. Appendix 5 was renewal of the contract which was authored by CPA Kisaka (1st Respondent’s only witness) as acting CEO of the 1st Respondent. The renewal letter read,

“as per the special full board of directors resolution MIN 4: SFB -KBWS/8/10/2015 I am pleased to offer you a renewal of your contract and the appointment in the position of commercial and finance manager. Your contract is extended for a period of three(3) years from 4th February 2016 to 3rd February 2019. All other terms and conditions of the letter dated 21st January 2023 referred to remain the same.”

195. The Court’s opinion is that the particulars of employment of the Claimant were as per letter of employment and the renewal. To answer issue 1, The letter of contract, which was not ambiguous, was authored by the employer (1st Respondent) with place of work as Kakamega Busia Water Supply Headquarters Kakamega.

Issue 2. Whether the claimant was eligible for deployment

196. Under the letter of employment (supra) the Claimant’s place of work was Kakamega Busia Water Supply. The Claimant submitted:-

“That 152 (3) *Water Act* 2016 provided thus (3) a person who at the commencement of this Act is an employee of the water services boards established under the *Water Act* 2002 shall be deployed as may be determined by the cabinet secretary to the public sector institutions or to the county governments.”

197. The Claimant submits that, for the foregoing, every Respondent was jointly responsible to ensure full implementation of the said provision and to ensure the claimant was fully deployed but which they



failed. That the Respondents also failed to comply with paragraph 4.1 of terms of the transfer deeds that required that the Claimant is transferred

“in the same terms and conditions of employment and his/their jobs shall be protected save for the disciplinary and or other reasons known in law.” (C-appendix 10A)

198. Paragraph 4.1 of the terms of transfer deeds reads:-

“the employees in the fourth schedule shall on the effective date be transferred to the respective County or its assigns in the manner and numbers indicated therein which shall become the new employers in the same terms and conditions of employment and their jobs shall be protected save for disciplinary and or other grounds known in law.”

199. The 1st Respondent’s exhibit 6 was agreement dated 23rd September 2016 between the 1st Respondent and the 4th Respondent under which in clause 2(G)employees and 4.1 in respect of water and sanitation services (provided by the Board through Kakamega Busia Water Supply)were transferred to the 4th Respondent(County Government of Busia). In the fourth schedule of the agreement at no. 7 was the name of the Claimant P/NO. 6200 Commercial & Finance Manager station Busia.

200. During cross-examination the Claimant agreed that the staff transferred were with respect to Kakamega Busia water supply where he worked.

201. The Court from the above analysis holds that the Claimant was working at the 1st Respondent’s Kakamega Busia Water supply as Commercial & Finance Manager was eligible for transfer to the county water bodies in compliance with Article 262 and the sixth schedule of *the Constitution* devolving water services to the counties as read together with section 152(3) of the *Water Act* 2016 to wit:-

“(3) A person who at the commencement of this Act is an employee of the water services boards established under the *Water Act*, 2002 shall be deployed as may be determined by the Cabinet Secretary to the public sector institutions or to the county governments.”

Issue 3. Whether the claimant’s transfer to the 5th Respondent was lawful

202. I have already held that the Claimant was eligible for transfer pursuant to the provisions of section 152(3) of the Water Services Act 2016.

203. The claimant asserted that the transfer procedure was faulty and no agreement was sought prior to change of work station to Busia as well as change in the Claimant’s position as acting managing director. The Respondents declined to recognize the Claimant as person with physical disability therefore denied grant rights under section 12 and 15 (5) of Person with Disability Act. That being physically disabled and attending medical treatment in Eldoret, the action to transfer the claimant to Busia that is 200km further away from the treatment center of Eldoret was prejudicial, unreasonable, unfair, fraudulent, malicious, discriminative and procedurally unfair and violated section 4 of *Fair Administrative Action Act*. Appendix 24.

204. During cross-examination by the 1st Respondent’s counsel, Mr. Were, the Claimant agreed the staff were to be shared between the two counties namely Busia and Kakamega and it was on that basis he was transferred to Busia effective 1st June 2016. That he was deployed on 16th June 2016 but did not report. The Claimant relied on his letter dated 27th June 2016 to the chairman of the joint committee as his



- seeking of permission to be away on medical condition (appendix 15 a- letter copied to the 3rd and 5th Respondents sought for review of decision to transfer Claimant to Busia seeking to stay in Kakamega on medical grounds).
205. The Claimant on further cross-examination agreed he did not report to new place of work stating there was a problem with the deployment. The Claimant agreed following the deployment he complained to the Public Service Commission. The claimant stated he learned of the response by PSC for him to report to the 5th Respondent through the 1st Respondent's response in Court. The Claimant stated that the transfer violated section 5 and 10 of the *Employment Act* which require consultation in change of terms of employment. He said that his terms were varied by change of station from Kakamega to Busia. That he ought to have been consulted and given notice. To buttress this submissions the claimant relied on decision in Kenya County Government Workers Union vs Wajir County Government and another (2020) e KLR, where the Court held that the unilateral decision of an employer to effect change (salary cut) without consulting staff offended the provision of section 10(5) of the *Employment Act* 2007.
206. During further cross examination by Mr. Were Advocate, the Claimants stated that before the transfer he was acting managing director. That he never relinquished his substantive position as commercial and finance manager. It was his position that under the transitional clause he was to retain his position. He stated he ought to have been retained as acting MD of the Board. He was aware of existing acting MDs for the 3rd and 5th Respondent before his appointment. The Claimant relied on letter of 16th May 2016 which stated he was to act as MD until further communication from the Board of Directors. The Claimant agreed that the counties took over the entity he had been appointed to and that he was deployed. That he was aware after devolution the department Kakamega Busia water supply had ceased. He was also aware the Board ceased to exist.
207. On the claim for disability the Claimant on further cross-examination by Mr. Were, told the Court that he was registered as a person with disability in 2017. That the medical report on his disability was for September 2016 by which time the joint committee had occurred. The claimant agreed that at the time of the joint committee he did not bring any issue of disability. The Claimant relied on his medical treatment notes and alleged that he had been in an accident and was in a wheel chair at the time of transition.

Decision

208. Disability is a legal term and different from mere body injury or sickness. The employer cannot infer disability by the fact of body injury or other malaise the employee may manifest to the naked eye. The Court observed that there was no evidence the treatment notes (Appendix 11) were received by the 1st Respondent before the transfer. The Claimant obtained certification as being disabled while the case was in Court on the 29th August 2017. It was clear to the Court the Claimant only brought up the issue of medical condition and disability claims after conclusion of the joint committee work of deployment, to challenge the transfer to Busia as preferred Kakamega. This was too late in the day. I found gem in the decision of my Sister Judge Mbaru in considering a similar case in Anne Wairimu Kimani v Kenya Agricultural Livestock Research Organization (KALRO) [2017] eKLR where the Judge held:-

“section 34 of the *Employment Act*, 2007 requires that where an employee is unable to attend work due to illness, sickness or any medical condition, such should be brought to the attention of the employer within a reasonable time. The law gives the condition that the employee should also submit a medical certificate from a medical practitioner. See Dorothy Ndungu versus Machakos University & others [2016] eKLR. 36. As such, where the claimant suffered a medical condition, such should as a matter of course been brought



to the attention of the employer and not wait to be submitted after the fact of her transfer. Work relations demands that the employer be informed of any matter facing the employee as soon as practically possible so as to allow the employer allocate work with such knowledge. It cannot therefore be appropriate that the claimant sat on information crucial and essential in the performance of her duties and up and until her transfer to Kakamega station sought to use the same to appeal against her transfer. Such a move only compromised the claimant's rights to challenge her transfer to a new station."

209. The facts in the Anne Wairimu Kimani case(supra) were similar to the instant case challenging a transfer. The Court in the case on the question of whether and employee is disabled or not in relation to transfer held:-

"The claimant in submission has relied on section 46 of the *Employment Act*, 2007 and applied the ground of disability as the reason why her transfer should be reviewed. The question of disability is well addressed in *the constitution* under article 54. and section 5 and 46 of the *Employment Act*, 2007. No person should be treated unfairly due to disability or be discriminated against on the grounds of disability or terminated from employment or treated unfairly at work due to disability.

42. In this regard, there is a fundamental difference between illness, sickness or general malaise and disability. Disability is defined under the United Nations Convention on the Rights of Persons with Disabilities and which definition is reiterated under the *Persons with Disabilities Act*, 2003. Sickness or illness is not equivalent to having a disability. Measures required to reasonably accommodate a person with a disability at the workplace are not similar to measures to be taken and addressed with regard to an employee who is sick, ill or suffering from a condition that requires medical attention.

43. The claimant is clear to the extent that she suffers from mobility problems following a chronic condition affecting her leg, hypertension and occupational depression. Such are not matters and or conditions defined as disability in law or under the international convention on disability.

44. However, disability is a matter well defined and addressed under the *persons with Disabilities Act*, 2003 and the law requires that where one has a disability, there are procedural requirements on how the National Council for Persons with Disabilities should receive such information, assess the person and ensure registration.

45. Due regard must therefore be taken by a party seeking to rely on the provisions of section 46 of the *Employment Act*, 2007 on a claim of disability, a violation or abuse of such rights. It is not an automatic application at will. There must exist reasonable grounds to justify such a claim.

46. The claimant does not address this aspect of the legal requirements in her assertion that she has a disability and ought to be treated as such by her employer. Without the requisite compliance on the part of the claimant, the respondent as the employer has no mandate in fact or in law to assign a disability upon the claimant and thus use the same to allocate work or give her preferential treatment as the claimant seeks to infer that her transfer should be reviewed on the grounds of her disability.



47. In the view on the letter of transfer issued to the claimant and dated 19th September, 2016 and the same having been reviewed vide letter dated 18th October, 2016 and noting that the respondent has since assigned other employees to duties that the claimant was undertaking at Thika station, the failure by the claimant to oblige is found unreasonable and contrary to her employment terms and conditions. The demands made as an appeal or petition are without merit. The orders sought are not justified."

I adopt with approval the foregoing decision to find that there was no evidence of disability of the Claimant as at the time of the decision of transfer and his body injury was not equivalent to disability for the Claimant to allege discrimination on basis of disability or even to challenge the transfer.

210. The Court further holds that on face value transfer is a management prerogative of the employer and the Court can only intervene if there is violations like change of terms and conditions of work to the detriment of the employee examples being demotion whether in rank or salary and loss of benefits.
211. The Disability Act provides for the rights of disabled employees and there was no evidence that the 5th Respondent had no capacity to secure rights of any disabled employee. The Court holds that the Claimant was not certified as a person living with disability under the law as at time of the transfer and that could not have been a basis for challenging the legality of the transfer.
212. The Court finds that from the evidence before it that Claimant was appointed as acting managing director Kakamega Busia water supply under the Board on 16th May 2016. His terms of service and conditions of service were to remain as per his current contract. The appointment was valid until further communication by the board of directors of the 1st Respondent. (C- - appendix 3)
213. The Claimant challenged the transfer on basis that he was not consulted, change of terms of employment and disability. There was no evidence that he was treated differently or any other staff was consulted. The transfer was necessitated by transfer of water and sanitation services from the national government water boards to the counties under Article 262 read with the sixth schedule of *the Constitution* on devolved functions. Section 152(3) *Water Act* 2016 provided for transfer of the staff employed under the water and sanitation bodies and that included the Claimant.
214. I do hold that the transfer of the Claimant to the 5th Respondent was a legal process. The Claimant did not reject in writing the transfer but sought to be retained by the employer yet the function had devolved. The Claimant admitted there was no evidence of his disability before the Board or the joint committee at the time of transfer. The Claimant produced a card issued by the National Council for Persons with Disabilities indicating his disability as physical and dated 29th August 2017(C-exhibit 11 a). The instant suit was filed on 27th July 2017. I do agree with the 1st Respondent the Board and the joint committee had no evidence of the Claimant's disability as at time of the transfer.
215. The Claimant stated his terms were changed and to buttress his position relied on the decision in Kenya County Government Workers Union vs Wajir County Government and another (2020) e KLR, where the Court held that the unilateral decision of an employer to effect to effect change (salary cut) without consulting staff offended the provision of section 10(5) of the *Employment Act* 2007. The Claimant (exhibit appendix 10 a) was extract of the transfer deed. Paragraph 4.1 of the transfer deed was to the effect that the staff were to become new employees of the 3rd and 5th Respondents in the same terms and conditions of employment. The fourth schedule of the deed indicated the Claimant was deployed as commercial and finance manager. As per letter of employment of 21st January 2013 the substantive position held by the Claimant was commercial and finance manager(C-exb appendix 4). The Claimant at time of transfer was the acting managing director of the Kakamega Busia Water Supply appointed



by the 1st Respondent board. The appointment was valid until further communication by the board of directors of the 1st Respondent. (C- exhb- appendix 3). The Claimant faulted the transfer as he was not deployed as acting managing director. The Claimant admitted he knew that the 3rd and 5th Respondents had acting managing directors as at time of appointment.

216. The acting appointment letter of the Claimant stated that the current contract terms and conditions of service applied and that the Claimant was to be paid acting allowance. I do find that the decision relied on by the claimant in Kenya County Government Workers Union vs Wajir County Government and Another (2020) e KLR, related to salary cuts which was not the case in the instant suit where the Claimant was transferred on same terms and conditions of service and in same substantive position. Acting in a position does not confer legal rights to the position as acting is a temporary solution pending recruitment of an holder to that position. The Claimant was paid acting allowance under the letter of appointment and that was the extent of his rights for the acting position.
217. The Claimant agreed that the Board ceased to exist upon the devolvement. The Court finds that the acting appointment of the Claimant ceased by act of the transfer deed of staff. The Claimant could only have been transferred in his substantive position which was done.
218. It is the opinion of this Court that the transfer of staff under the transfer deed was legal process following devolution of water and sanitation services from the national water boards. It was not an issue of discretion for the Claimant's employer. I do find the Court has no basis to faulty the process as the Claimant did not prove his terms of employment as per contract were changed to his disadvantage. The issue of disability was not before the joint committee. I do find the authorities relied on disability and change of terms of employment on transfer thus not relevant as the events were not proved. In the upshot I hold that the Claimant's transfer to the 5th Respondent was lawful.

Issue 4. Whether the 1st Respondent violated the ,Claimant's rights to information and the question of jurisdiction of the Court), whether the claimant was discriminated against and whether the respondent violated the Claimant's right to resolution of dispute.

219. On the right to information, the Claimant produced letter dated 27th January 2017 requesting for information including transfer deed , joint committee report and claimed the information was denied(appendix 18). The Claimant stated that the request was delivered vide post office registered mail (appendix 31a, letter dated 29th February 2017.)
220. The 1st Respondent submits that the jurisdiction on the issue fell under the ambit of the High Court pursuant to article 165(3)(b)

- “(3) Subject to clause (5), the High Court shall have—
- (a) unlimited original jurisdiction in criminal and civil matters;
 - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;”

That this Court lacks jurisdiction.

221. The Court did not find nexus between the transfer which was the cause of action and the said right to information post the deployment. The documents were produced at the hearing hence no prejudice suffered by the Claimant in this case. The Claimant did not plead that he was not aware of the



deployment terms and indeed produced the transfer deed(appendix 10 a). The Court finds no evidence of the alleged violation.

222. The Claimant alleged discrimination. In the claim the discrimination was hinged on the issue of transfer with change of terms and his disability. The Court already ruled out the two issues. The Claimant during the hearing stated he did not know of any staff who was consulted on the deployment. The Court finds no basis of the allegation of discrimination.
223. On the resolution of dispute, the Claimant did appeal to the Public Service Commission. The Claimant told the Court he did not receive their response before filing of suit and that he only got to know of the Commission's decision vide the additional documents filed by the 1st Respondent on 4th July 2023 where they produced letter dated 27th September 2017. The decision of the Commission was for the Claimant to report to the 5th Respondent as deployed. The Claimant did not satisfy the Court that he made effort to get the outcome of his appeal to the Commission before coming to Court. I find that the Claimant invoked a dispute resolution mechanism and cannot fault the Respondents on the same.
224. The Claimant relied on clause 7 of the agreement between his employer and the 4th Respondent. I find the clause refers to dispute between the Board and the County. Clause 18 provided any dispute arising from the agreement was to be resolved in accordance with Kenyan laws. On this issue I find no violation of the rights of the claimant by the Respondents as his dispute was resolved by the Public Service Commission and this Court as invoked by the Claimant.

Issue 5. Whether the Claimant is entitled to reliefs sought.

225. The Claimant sought for various reliefs and the Court proceeds to consider each individually.

A declaration that the contract of employment signed on 4th February 2013 and renewed on 3rd February 2016 remained legal and binding on both parties and the claimant is entitled to his full salary, allowances and gratuity.

226. I find that the Claimant had a valid contract of employment with the 1st Respondent upto date of deployment being 15th June 2016 when his services were lawfully transferred to the 5th Respondent. The Claimant admitted he never reported to the new work place. It was the 5th Respondent's submission that for failure to accept the deployment and report the 5th Respondent has no employer employee relationship with the Claimant.
227. It was the Claimant's submissions that his office was closed by the 2nd and 6th Respondents on 14th -16th and 20th June 2016. The Claimant relied on his appointment as acting MD to state he continued to work for the 1st Respondent after the transfer.
228. 1st Respondent reiterates that after the Claimant's cessation of employment with the Lake Victoria North Water Service Board, Kakamega – Busia water supply following the Claimant's receipt of the deployment letter dated 15/6/2016 asking him to report to the 5th Respondent which was his new station following dawn of devolution system of governance, the Claimant being a signatory of Lake Victoria North Water Services Board, Kakamega – Busia water supply was requested to sign cheques among other duties to facilitate the smooth transition from Lake Victoria north water service board, Kakamega – Busia water supply to respective counties being the 2nd and 4th Respondents. That it is for the foregoing reason that the Claimant was paid on 28/9/2016 and not that he was an employee of the 1st Respondent.



229. The Claimant in response stated he was not requested to sign any cheques or vouchers as that was his job description on daily basis. The Claimant submits that his office was closed in August 2016 permanently. He was paid his salary for July and August on 28th September 2016.
230. The Court finds that if the Claimant's office with the 1st Respondent was closed in August 2016 permanently then the assertion by the 1st Respondent that he was not working in the month of September 2016 hence not entitled to salary from the 1st Respondent was valid. The Court found it reasonable that the Claimant would be required to sign off cheques at the transition period having been a bank signatory. The Court finds in doing so he was performing his duties as a signatory during the transition period. The Claimant after the transition did not report to the 5th Respondent even after being advised to do so by the 6th Respondent in response to his inquiry. Equally since the Claimant did not accept and report to new work place he had no employer employee relationship with the 5th Respondent.
231. The 1st Respondent submits that the Claimant did not state the period of gratuity. The Court finds that the 1st Respondent by act of payment of salary of July and August 2016 assumed responsibility to pay any payable gratuity or pension to the Claimant for the entire period of employment upto August 2016. The Claimant was working in the period and hence entitled to payment of all dues under his contract with the 1st Respondent. The Court finds that the services of the body he was acting as MD having been transferred the Claimant was not entitled to acting allowance for July 2016 and August 2016.
232. Clause 15 of the Claimant's employment contract provides for payment of one off gratuity at the rate of 31% of annual basic salary which is taxable. The Claimant only completed one contract term being 3 years of contract of 21st January 2013. The Court found in the submissions the Claimant addressed gratuity in the period of the renewal. It is my finding that the renewal period did not meet the condition for payment of gratuity. The Claimant in the claim did not state actual period of the unpaid gratuity. The Court found light in his submissions to be that he was seeking gratuity for the renewal period which period served did not qualify for gratuity.

An order that the respondent do pay the claimant the sum pleaded in paragraph 12 above-

233. The Court observed that the period sought for payment being September 2016- 3rd February, 2019 when the Claimant's contract was to expire, the Claimant was not working having refused to report to new place of work. The Claimant is not entitled to any payment in the period.

General damages for breach of employment- contract.

234. This claim was not proved.

A declaration that the respondent's behavior was high handed, malicious, arbitrary and highly reprehensible misconduct that departs from a marked degree of ordinary standards of decent behavior and is entitled to punitive damages.

235. The Court did not find evidence of the allegation.

Declaration that the transfer was discriminative, unprocedural irregular, malicious, fraudulent, illegal and unfair thus null and void.

236. The Court did not find evidence to prove the allegation



Declaration that the Claimant suffered workplace harassment, bullying and intimidation.

237. The Court did not find prove of the allegation.

Declaration that the Claimant's constitutional rights under A10, A21 (3), A27, A29 (D), A35, A41, A47, A54 (1) (A) and A236 were violated and is entitled to punitive damages.

238. The Court did not find prove of the allegation.

In Conclusion

239. The claim has failed. The claim dated 20th July 2017 and amended on the 14th October 2017 is dismissed. To temper justice with mercy taking into consideration the events leading to the suit and all parties were being represented by counsel instructed by government entities I order each party to bear own costs in the suit.

240. It is so Ordered.

DATED, SIGNED & DELIVERED IN OPEN COURT AT BUNGOMA THIS 29TH NOVEMBER 2023.

JEMIMAH KELI

JUDGE.

In The Presence of :-

For Claimant : Absent

For 1st Respondent:- Were

2nd, 3rd, and 6th Respondents- Wabuko h/b M'Mbaka

4th Respondent- Otsieno h/b Wambura

5th Respondent – Juma

