Gichimu v Higher Education Loans Board (Cause 769 of 2019)
[2023] KEELRC 2918 (KLR) (16 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2918 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 769 OF 2019

B ONGAYA, J

NOVEMBER 16, 2023

BETWEEN

SHEM ANDREW GICHIMU ..... CLAIMANT

AND

HIGHER EDUCATION LOANS BOARD ..... RESPONDENT

JUDGMENT

1. The claimant filed the Statement of claim on 13.11.2019 through J. N. Namasake & Company Advocates. The claimant prayed for judgment against the respondent for:
    a. A declaration that the termination of the claimant's employment with HELB was wrongful, unfair and discriminatory and should be rescinded.
    b. The claimant be reinstated as the Chief Finance Officer of the respondent.
    c. That the claimant should be paid damages for wrongful termination and discrimination in terms of the *Employment Act* 2007.
    d. The Honourable Court issue such orders and give such directions as it may deem fit for justice and the better running of the respondent especially the finance division.
    e. Cost of the suit.
2. The Statement of response was filed on 16.12.19 through Obura Mbeche & Company Advocates. The respondent prayed that the suit be dismissed in its totality with costs to the respondent.
3. The claimant's case was that with outstanding academic and professional qualification and after working with distinction in various organisations in the private sector, he ventured into employment in the public sector in 2007.

4. That he was employed by the respondent with effect from 04.06.2007 as Head of Finance in Grade II salary scale (Kshs.100,620×8,040×108,660×8,960-117,626×10,360-127,980) and entered at a basic salary of Kshs.127,980/= per month, plus house allowance of Kshs.60,000/=.

5. The claimant stated that he opted for permanent and pensionable terms of employment, rather than contractual term of 5 years. As such he was placed on probation as per his letter of appointment dated 06.03.2007, which he successfully completed, and was confirmed as Head of Finance with effect 01.11.2007.

6. The claimant served as Head of Finance until 2017 when there was a restructuring which culminated in his position being re-designated to Chief Finance Officer. As Chief Finance Officer his responsibilities included:

    a. Formulation of budgets for the organisation.

    b. Tracking of all income and expenditure of the organisation.

    c. Approval of all financial activity of the organisation.

    d. Advising the board and senior management on all finance and accounting matters.

    e. Preparation and signing of the annual financial statements.

    f. Management of the finance division.

7. It is the claimant's case that he worked with diligence and honesty in his position. The only incident that interrupted his smooth discharge of duty was when he was sent on compulsory leave on 06.06.2018 following a Presidential directive that required all head of accounting officers in the public service, to step aside, for purposes of vetting their integrity and determine whether they are fit to hold public office.

8. The claimant was reinstated and resumed duty on 29.10.2018 after being cleared and being declared fit to hold public office.

9. He maintains that he served with diligence and due care until his contract of service was suddenly terminated through a letter dated 27.09.2019 without valid reasons for termination being stated. The claimant states that his termination was contrary to the Leadership and Integrity Regulations 2015, paragraph 22(8) and the *Anti-corruption and Economic Crimes Act* section 65.

10. The claimant states that there were a series of events leading up to his termination. He states that on 25.03.2019 the claimant's direct report, Finance Manager, Ms. Kerin Lidoroh brought to his attention a discrepancy in the respondent's March 2019 payroll. Specifically, she was concerned that the basic salary figure for the Chief Operations Officer (COO), Mr. Geoffrey Monari, differed from that paid in previous months. On further inquiry, she was advised by the acting human resource manager (Ag. HRM) Mr. Gilbert Wir, that this incremental credit had been done with the approval of the Chief Executive Officer (CEO) Mr. Charles Ringera. In support, he produced a memo prepared by himself to the CEO, requesting for the change in the COO salary.

11. The memo explained that there was a huge discrepancy between the basic salary of the COO and that of other members of staff within the same grade (Grade II). The CEO approved this change by appending his signature on the face of the memo.

12. The claimant states that he was concerned, and requested to be provided with a board resolution authorizing the said change in the basic salary of the COO. In turn he was advised that there was no board resolution supporting the decision.

13. The claimant then sought the legal advice of the Head of Legal and Corporation Secretary (HLSC) Mrs Bernadette Masinde, who as the custodian of all board deliberations, would have had a copy of the said board resolution. She responded in the negative and stated that on 26.03.2019 she had separately advised that there were quite a number of people affected by the matter at hand, and, it was due to the salary structure. She indicated that the organisation should adopt a holistic approach to resolve salary discrepancies.

14. The claimant maintains that based on his responsibility to undertake financial oversight of the respondent, he declined to approve the payroll changes that were not supported by a board resolution.

15. The Ag HRM following the advice received from the claimant and the HLSC sought the CEO's approval to disregard the incremental credit. However, the CEO maintained his position and directed that there should be no further engagement on the matter.

16. On 27.03.2019, Ms. Lidoroh wrote a memo to the CEO through the claimant's office, expressing concern about the un-prodecural incremental credit and requested for approval to process the March 2019 payroll, for the sake of the staff. The CEO approved the request on 27.03.2019 through appending his signature on the face of the memo, and all staff salaries with the exception of that of the COO were paid. The COO's salary was adjusted to what he was being paid previously and paid the next day.

17. The CEO complained to Mr. Charles Onami Maranga, the Chairperson of the Board's Finance Staff and General Purpose (FS&GP) Committee, and expressed that he was being frustrated by the finance team, who had refused to follow directives he had given as the executor of board decisions.

18. The claimant states that he wrote a memo to the CEO dated 03.04.2019 in which he explained that as the CFO, his mandate was to ensure that all payments were proper and in-line with stipulated laws, code of conduct, policies and procedures. He explained that there was no board resolution on salary increment for the COO and that there was no reason provided to explain why only one staff member was picked.

19. He stated that all payments flagged as irregular by the FM, HLCS and himself were still appearing in the respondent's books as outstanding debts in individual staff debts accounts or as unresolved integrity and governance issued.

20. The claimant maintained that without board approval, the process was illegal and irregular and that handling only one individual's salary was discriminatory. He recommended that the HR department develops a board paper for discussion by the FS&GP Committee during their next meeting.

21. On 08.04.2019 the claimant was issued with a show cause letter requiring him to show cause why disciplinary action should not be taken against him, requiring him to respond by 5.00 pm on 12.04.2019. The claimant responded to the notice and reiterated the contents of his memo dated 04.04.2019.

22. The claimant states that he was under undue pressure to act on instructions that were against the law, the organisation policies and procedures as well as his profession, and accordingly, on 04.06.2019 he contacted and made a report to the Ethics and Anti-corruption Commission (EACC) for investigation and appropriate action.

23. On 16.04.2019 the claimant was issued with a show cause letter to explain his absence between 11.23 am and 5.00 pm on 15.04.2019 without prior authority from his immediate supervisor. The claimant states that he responded to the show cause letter on 23rd April, 2019.

24. On 06.06.2019 the claimant wrote a statement with the EACC. Other officers of the respondent as well as board members were also summoned to write statements.

25. The board being aware of these investigations, held a meeting on 15.06.2019 to discuss the same.

26. On 01.07.2019 the claimant was invited to appear before an Ad-hoc Disciplinary Committee of the Board fixed for 08.07.2019. That on 08.07.2019 he appeared before the committee and that on the same date he was issued a letter inviting him to a disciplinary hearing on 15.07.2019, in relation to the show cause letter of 08.04.2019 and his reply of 12.04.2019.

27. Subsequently, on 27.09.2019 the claimant was issued with a termination letter, wherein he was requested to hand over to the Finance Manager.

28. On the part of the respondents it is stated that the claimant is the immediate former Chief Finance Officer of the respondent who was initially employed in June 2007 as the head of finance and the role was re-designated to that of CFO effective 11.09.2017.

29. That it was an express term of his employment that either party could terminate the contract by giving to the other 3 months' notice or 3 months' salary in life thereof.

30. As the CFO the claimant reported directly to the respondent's CEO who had overall oversight authority over the CFO's duties and whose key responsibilities was to see to the efficient execution of board directives.

31. It was stated that at a board meeting held on 04.02.2019, it was noted that there was a need to align the existing salary structure owing to an attainment of notional maximum for some grades.

32. In March 2019, while recruiting for the office of Chief Innovation and Technology Officer (CITO), it was noted that there were discrepancies in salaries of the chief officers.

33. The CITO who was recruited internally and was moving up from grade IV to grade II was going to earn a higher salary that the COO who had been appointed to grade II about 2 years earlier on promotion from grade III and who was in fact earning a salary lower than that of the lending manager his subordinate in the department.

34. It is stated that this led to a comprehensive analysis of staff cadres and salaries in order to identify whether other staff were similarly affected which revealed that the Head of Internal Audit Risk Management and Compliance was also affected at senior management level and was earning a salary less than that of his subordinate, the assistant manager, risk management.

35. The exercise identified that there were a number of employees whose salaries had overlapped into higher grades, even up to 2 grades higher, thereby creating a scenario where some staff holding junior positions were earning more than staff in senior positions.

36. The respondent states that the prevailing situation was also as a result of some job specific factors of compensation that had led to higher pay for certain positions within the organisation and as there was an immediate need to remedy this undesirable situation, it was decide to commence a review by adjusting salaries of the COO and Head of Internal Audit Risk Management and Compliance who were the only senior members of staff earning less than their subordinates.

37. The COO's salary was adjusted concurrently with the appointment of the CITO and was to take effect beginning March, 2019 payroll, whereas the accounting officer requested that the salary adjustment of the Head of Internal Audit, Risk Management and Compliance to be varied thereafter.

38. It is stated that the adjustment to the salary of the Head of Internal Audit Risk Management and Compliance was approved in April, 2019 but was not immediately effected in the payroll owing to a stalemate experienced in implementation of the COO's adjusted salary.

39. In March 2019, when payroll was being processed the claimant raised some questions via his email of 25.03.2019 to the Acting Head of Human Resources which email the Head of Legal Services ultimately responded to on 26.03.2019 offering suggestions without involving the CEO who had communicated approval of the adjustment to the COO's salary.

40. The claimant advised the Acting Head of Human Resource to prepare the payroll without the approved adjustment to COO's salary and only then was the CEO involved vide an email of 26.03.2019 from the Acting Head of Human Resource. On the same day the CEO responded to all the concerned officers and offered guidance, however, despite explicit instructions it is stated that the claimant corresponded with the Head of Legal Services and opted to ignore the instructions of the CEO.

41. That owing to the stance by the claimant, the CEO reiterated his instructions. However, on 27.03.2019 the claimant formally recused himself from the payroll approval process for March 2019 salaries and passed it over to the Accounting Officer.

42. The Finance Manager wrote to the CEO requesting approval of the payroll for March 2019, to which the CEO approved, but the same could not be paid out as a 2nd signatory was required.

43. The Finance Manager who was to sign off as the 2nd signatory declined vide her email of 28.03.2019, prompting the CEO to escalate the matter to the Chairman, Finance Staff and General Purposes Committee of the board with a copy to the Board Chairman in a bid to break the stalemate.

44. It is stated that a review of the salary payment system transaction log revealed that the claimant who had rescued himself nevertheless proceeded to intercept the salary payment file which had been approved in the online banking system and proceeded to remove the COO's adjusted salary from the payment and later paid the COO's salary without the approved adjustment.

45. It is argued that the claimant disregarded instructions of the CEO and countermanded the CEO's instructions to other staff members thereby undermining the authority of the CEO and disregarded the board's directive thereby causing disharmony in office operations.

46. The claimant's persistent insubordination led to issuance to him of a show cause letter on 08.04.2019 to which he tendered a written response.

47. That on 15.04.2019 while the disciplinary process was pending, the claimant absented himself from duty without authorisation from 11.53 am to 5.00pm resulting in issuance of a show cause letter to him on 16.04.2019 to which he responded admitting his absence from office and failure to inform his supervisor of his whereabouts.

48. The claimant's responses were found unsatisfactory and on 01.07.2019 and 08.07.2019 the claimant vide letters of even dates was invited to appear before the board disciplinary committee, which hearings took place as scheduled.

49. In June of 2019 the CEO, the board chair, some members of the respondent's board and other staff members were invited by the EACC to record statements based on alleged unethical conduct at the respondent corporation.

50. A special board meeting was held on 23.09.2019 with the result that the claimant was terminated on 27.09.2019 and paid his salary for September with the remainder of his dues to be paid upon his completion of clearance procedures.

51. The respondent maintains that the claimant was well aware of the reasons for his termination which were captured in his letter of termination as failure to obey a lawful command and unauthorised leave of absence from the workplace borne out of his own actions and submissions.

52. The parties filed their respective submissions. The Court has considered the parties' respective cases and makes finding as follows.

53. To answer the 1st issue the Court returns that the parties were in a contract of service and there is no dispute in that regard.

54. To answer the 2nd issue the Court returns that the claimant's contract of service as the respondent's Chief Finance Officer was terminated by the letter of termination of employment dated 27.09.2019. The letter conveyed to the claimant that for the allegation of absence from designated work station on 15.04.2019 between 11.23am to 5.00pm the Ad-hoc Disciplinary Committee had recommended and the Board resolved that the claimant is issued with a first warning letter. The letter further stated that the show cause letter of 08.04.2019 required the claimant to explain why disciplinary action should be taken against him for failure to obey lawful instructions and negligence of duty. Further, the Management had found his response of 12.04.2019 unsatisfactory as his conduct amounted to gross misconduct per section 44(4) (c) of the *Employment Act* for willfully neglecting to perform work which it was his duty to perform or carelessly and improperly performing work which by its nature it was his duty, under his contract, to have performed carefully and properly; and, section 44(4) (e) of the Act on an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer. The letter stated that the second disciplinary hearing had been held on 15.07.2019 and the claimant had been given an opportunity to attend with a person of his choice but opted to attend alone. Further, a full Board meeting had been held on 23.09.2019 and the report of the Ad-hoc Disciplinary Committee was considered in that regard. The letter stated that after due consideration of the report of the Committee, the Board adopted the Committee's report, took cognizant of the claimant's tenure at HELB and recommended to terminate the claimant's employment with the Board with effect from 27.09.2019. The letter directed him to handover to the Finance Manager Ms. Kerin Lidoroh, complete the staff clearance form and thereafter to be paid three (3) months' salary in lieu of notice as stipulated in his letter of appointment ref. No. HELB/ADM/R/001/33 dated 06.03.2007; a total of 21 leave days; retirement benefits per the Pension Scheme's rules and regulations; and any other lawful benefits that he might have accrued up to 27.09.2019.

55. The 3rd issue is whether the termination was unfair. The evidence is that the claimant declined to implement the CEO's instruction that the Chief Operations Officer's basic monthly salary be increased from Kshs.218,791.13 to Kshs.253,923.43 effective the salary payable at end of March 2019 per the payroll that had been prepared for payment of the salaries for the respondent's employees. The Court has considered the reasons the claimant advanced in declining to pay the increment as follows:

    a. The CEO's instruction referred to a board directive but when the claimant wrote an email dated 27.03.2019 at 7.00am asking the Head of Legal Services and Corporation Secretary one

Bernadette Masinde about existence of the Board resolution, the said Bernadette Masinde replied by the email of 27.03.2019 at 7.46am conveying that there was no such Board resolution that the salary for the Chief Operations Officer be increased in the manner that the CEO had instructed. The Court has considered the record particularly of the disciplinary hearing and the minutes show that indeed there was no such Board resolution. The Board had consciously emplaced the Chief Operations Officer at a particular salary point with prescribed annual increment dates. It cannot be that the Board set entry point with prescribed annual increments could be varied by the CEO without a proper Board resolution in that regard. Nothing on the record has been shown to authorised the CEO to give the kind of basic salary increment like the one that was in the CEO's instruction. Mr. Gilbert Wir being the Acting Head of Human Resource informed the Ad-hoc Disciplinary Committee that he decided to prepare a memo dated 20.03.2019 for the CEO's approval on harmonisation of basic salaries for the Chief Officers of HELB. Further that after recruitment of the Chief Innovation and Technology Officer, Mr. Wir had realised that his basic salary was higher at Kshs.253,923.43 per month compared to that of Chief Operations Officer at Kshs.218,791.13. Thus, by his said memo he had requested the CEO to approve implementation of payroll for March, 2019 for the Chief Operations Officer to earn the same figure as the Chief Innovation and Technology Officer. Mr. Wir confirms that there was no Board resolution in that regard because the Head of Legal Services and Corporation Secretary had confirmed to the claimant that the relevant SF&GP Committee of the Board had not discussed the issue so that there were no minutes. The said memo by Mr. Wir by his own admission also had serious error vitiating it as a valid instruction by the Board as Mr. Wir informed the Committee thus, "I sincerely apologize, this is a mistake and I am seeing it for the first time. I confirm that I am the one who prepared the memo and signed at the CEO's designated space unknowingly. The CEO did not see this mistake otherwise, he would have rectified it before we submitted it to finance for processing." How then, can an instruction not actually signed by the CEO be valid? The claimant's fears that he had by all means to avoid personal liability arising from compliance with the impugned instruction therefore becomes apparent. How can the claimant be faulted when he informed the Ad-hoc Disciplinary Committee thus, "The CEO's instructions were not premised on any laws or policies, no power is vested on the CEO to review staff salaries. It was discriminatory to review the salary for one person yet there were other staff who were affected and the salary disparities is a norm in HELB; I read ill motive in the Ag. HHR's memo dated 20th March, 2019." And further stating that the Chief Operations Officer had been awarded 2 incremental credits in the past two years and therefore was not eligible for another one without following due process and that he had not wilfully neglected to sign the payroll. The Court finds that the claimant had effectively exculpated when he further informed the Committee thus, "In my view, the HR memo was misleading having been prepared by the Ag. HHR to the CEO, signed off by the Ag. HHR and then approved by the CEO; about sixty-six (66) employees are affected by the same salary disparity, the salary increment was irregular and illegal and that is why I sought advice from HLSCS, who is the legal advisor of HELB and I was convinced that she is right in as far as this matter was concerned." The Court observes that for unexplained reasons, the Committee failed to call the HLSCS Bernadette Masinde to testify in that regard and there is no reason for the claimant to be faulted for relying on the legal and professional advice by the said Bernadette Masinde and which the respondent has failed to show was wanting in any material or relevant respects. To further confirm that the impugned instruction was irregular and unlawful without due authority on the part of the CEO, Mr. Wir informed the Committee that the Chief Operations Officer had continued to earn salary as the claimant had considered to be the rightful basic salary.

b. It would be discriminatory to increase the basic salary of the Chief Operating Officer in the manner it was being directed by the CEO whereas there were numerous other officers who whose salaries suffered similar discrepancies. The Court has already seen the claimant's account to the Committee that over sixty-six (66) HELB staff at material time had adverse discrepancies in their basic salaries. Mr. Wir confirmed the same when he informed the Committee thus, "I agree that the COO and Head of Internal Audit and Risk Management earn less than their immediate Assistants. The placement of CITO and COO Jobs was executed by the Salaries and Remuneration Commission when the Commission undertook the job evaluation." The CEO confirmed the same discrepancies to the Committee. How then is the claimant to be faulted when he declined to implement the impugned instruction and, only in favour of the Chief Operating Officer one Geoffrey Monari, without Board resolution, and, in circumstances that there were several other officers with similar discrepancies? Mr. Wir further confirmed the impugned increment was irregular and the CEO had no authority to instruct as he did when he informed the Committee that the HELB policy was silent on salary increment but the Public Service Commission Human Resource Manual had outlined the incremental credits. It appears to the Court and is found that once the Board employed the Chief Operations Officer and emplaced him at a designated salary entry point, then only the Board could resolve to enhance his point in the designated salary scale as approved by the Salaries and Remuneration Commission. Further, the Court considers that per the claimant's assertion, the Chief Operations Officer would then only enjoy annual salary Mr. Wir's position is consistent with the claimant's position at page 4 of his letter dated 12.04.2019 in response to the letter to show cause when the claimant stated thus, "d) As per the Public Service Commission Human Resource Policies and Procedures Manual for Public Service, incremental credits should be granted in respect of approved experience gained after acquiring the requisite minimum qualifications. The COO's increment was based on other Chiefs' salary scale, hence irregular."

56. The Court has considered the letter by the Ethics and Anti-corruption Commission exhibited for the claimant dated 22.11.2021. the letter addressed to the claimant stated as follows:

> " The Commission pursuant to its Constitutional and Statutory mandate as set out under Article 252(1) (a) (d) of *the Constitution*, section 11 of the *Ethics and Anti-Corruption Commission Act*, 2011 and section 4(2) and 42 (10) of the *Leadership and Integrity Act*, 2012 commenced investigations into allegations of irregular awards of incremental credits to one of the staff by Mr. Charles Ringera, the Chief Executive Officer (CEO), Higher Education Loans Board (HELB).
>
> The Commission investigated the allegations and established that the said Chief Executive Officer did not comply with the Human Resource Policy regarding such awards.
>
> The Commission, therefore, recommended administrative action against the Chief Executive Officer.
>
> We thank you for your continued cooperation and appreciate you taking the time to make the report.
>
> Partrick Owiny
>
> For: Secretary/Chief Executive Officer"

57. The claimant's witness No. 2(CW2) was Peter Mwita, An Investigation Officer employed by the Ethics and Anti-Corruption Commission. He confirmed the Commission received the complaint by the

claimant against the respondent's CEO Mr. Charles Ringera about the impugned instruction on the salary increment. The investigations, per CW2's testimony revealed as follows:

a. The claimant made the complaint on 04.06.2019.

b. CW2 was assigned to investigate the case.

c. Investigations established that in March Mr. Charles Ringera, CEO HELB by memo dated 20.03.2019 prepared by Acting Human Resource and Administration Manager Mr. Gilbert Wir approved the award of incremental credits to Mr. Geoffrey Monari. The said review was meant to harmonise the basic salaries of the Chief Officers. The basic salary of Mr. Geoffrey Monari had been reviewed by three steps upwards from Kshs.218,791.13 to Kshs.253,923.43 per month.

d. Further in October 2019 upon the termination of the claimant from HELB on account of declining to implement the same in March, 2019 citing lack of supporting documents or approval from the Board, the impugned increment was implemented in favour of Mr. Geoffrey Monari. Thus, from October, 2019 to when Mr. Geoffrey Monari exited HELB, he had cumulatively drawn Kshs.491,852.30 as irregularly awarded to him.

e. Investigations further established that the salary increment awarded by the CEO, HELB, Mr. Charles Ringera to Mr. Geoffrey Monari was in contravention of Part c.2 (2) (1) to (iv) of the Public Service Commission Human Resource Policies and Procedures Manual for Public Service (May, 2016) which provides for conditions for the award of incremental credits. The provisions of the Manual were binding upon HELB.

f. The Commission having found that the CEO acted irregularly in the award of incremental credit to Mr. Geoffrey Monari, it issued a demand notice to the CEO HELB Mr. Charles Ringera, for recovery of Kshs.491,852.20 paid to Mr. Geoffrey Monari as incremental credits between October 2019 and November 2020. The HELB CEO appealed against the Commission's decision but the Commission upheld its decision. The CEO has filed in the High Court Anti-Corruption & Economic Crimes Judicial Review Application No. 1 of 2021 challenging the Commission's decision.

58. The Court has considered the material evidence and upholds the submissions made for the claimant thus, "34. In summary, there was no lawful order that the Claimant failed to obey and further he was not guilty of gross negligence/misconduct. The order was null and void ab initio. Hence, there was no valid reason for termination of the employment of the claimant. Where there is no valid reason for termination, regardless of the procedure followed, the termination is still unlawful." The Court finds that the termination was unlawful and unfair for want of a valid reason per section 43 of the *Employment Act* and there was no fair reason as envisaged in section 45 of the Act. It was unfair. As was held in Judicial Service Commission and Another -Versus- Lucy Muthoni Njora (Civil Appeal 486 of 2019) [2021] KECA 366 (KLR) (7 May 2021) (Judgment), employers ought to understand that in taking the drastic dismissal actions that cut short the careers and livelihoods of employees, they should be sure that they are acting reasonably and fairly with the dismissal being a necessary step. The Court has found that in the instant case the claimant was dismissed unfairly upon unreasonable and unlawful instruction and he was entitled to disregard that unlawful instruction. As he set out in his response to the letter to show cause, he was well guided by the following provisions of law and *the Constitution*:

a. Article 232 (1) (e) of *the Constitution* on the values and principles of public service including accountability for administrative actions.

b. Article 232 (1) (i) of *the Constitution* requiring him to uphold public service value and principle of affording adequate and equal opportunity for appointment, training and advancement at all levels of public service which barred him to implement a discriminatory salary increment.

c. Section 35 (c) of the *Leadership and Integrity Act*, 2012 that state or public officers who act under an unlawful direction shall be responsible for own action.

d. Section 196(5) of the *Public Finance Management Act* that a public officer shall not direct another public officer to do an act that constitutes a contravention of or failure to comply with the Act, *the Constitution*, or any other written law.

e. The Public Service Code of Conduct, 2016 Part II (10) (c) that a public officer shall not discriminate against any person and the instruction on discriminatory salary increment was unlawful. Also, at Part II (10) (a), the Code provides that a public officer shall be accountable for his or her administrative acts.

59. The Court upholds the claimant's position that if he acted per the irregular and illegal impugned instruction, he would thereby be in breach of the cited public service standards of conduct, ethics and integrity. He would in the circumstances be liable to be held personally liable for failure to perform his duties professionally as the respondent's Chief Finance Officer.

60. The Court has considered the submissions for the respondent that the claimant had recused himself from approving the payment of salaries for March 2019 in view of the irregular and impugned increment. The respondent faults the claimant for removing the impugned salaries from the payroll. However, the Court returns that the claimant was acting within his proper powers as the Chief Finance Officer and within the cited public service standards of conduct, ethics, integrity and his role as employed by the respondent.

61. The 4th issue is on remedies. The Court returns as follows:

a. The claimant prayed for a declaration that the termination of the claimant's employment with HELB was wrongful, unfair and discriminatory and should be rescinded. The Court has already found that the termination was wrongful and unfair. A declaration will issue accordingly. The claimant prays as well that the termination was discriminatory. Article 27 of *the Constitution* provides, inter alia, thus:

1. Every person is equal before the law and has the right to equal protection and equal benefit of the law.

2. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

3. Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

4. The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, ethnic or social origin, color, age disability, religion, conscience, belief, culture, dress, language or birth.

5. A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

Article 236 of *the Constitution* provides that a public officer shall not be victimised or discriminated against for having performed the functions of office in accordance with *the*

Constitution or any other law; or, dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.

62. The Court returns that the claimant has established that he was discriminated against and terminated from employment on account of having performed his duties in accordance with his job description, the provisions of *the Constitution* and the statutory provisions all of which he has cited- and the Ethics and Anti-Corruption Commission has indeed vindicated him. The evidence is that the claimant was terminated because he was keen to perform his duties in accordance with *the Constitution*, statutes, and the applicable public service code of conduct, ethics and integrity. The Court finds that the claimant was discriminated on account of his belief and conscience that as a public officer he was bound to act in accordance with the law. The claimant has as well established that he was discriminated and victimised on account of having performed his duties in accordance with his authority, law and the public service code of conduct and ethics as envisaged in Article 236 of *the Constitution*. He held steadfast political opinion, belief and conscience that public service delivery must be in accordance with the law and for doing so he was discriminated, victimised and subsequently terminated from employment by the Board which paid a blind eye to the applicable law and Article 236 of *the Constitution*. The Court follows its opinion in the addendum judgment in Masoud -Versus – Kenya Revenue Authority (Cause 906 of 2016) [2022]KEELRC1393 (KLR) (22 July 2022) (Judgment) thus, "In that judgment the Court found that the claimant had established discrimination under section 82(2) of the Former Constitution of Kenya. The Court found that the claimant was targeted for rejecting corruption and abuse of the official public employment he held because he remained steadfast and strongly believed in delivery of his official duty with integrity, honesty, and, in accordance with relevant law. The Court is making this addendum and clarification that for purposes of section 82(3) of the Former Constitution of Kenya, the claimant has established that he was discriminated, unfairly treated, victimized, and subsequently his contract of service with the respondent was terminated on account of his deep-rooted political opinion and belief in rule of law and good public service delivery free from official or political corruption. He strongly believed and implemented good governance believing in prevalence of the rule of law, and, that official public service must be delivered in accordance with relevant statutory provisions, integrity, and honesty. He suffered loss of his job because he held a strong political opinion or belief of embracing integrity and good governance and consistently rejecting official or political corruption – "political" in Black's Law Dictionary Ninth Edition meaning, "pertaining to politics; or, relating to the conduct of government". The claimant called it, correctly so, "settling of scores" – that, the unfair treatment and discrimination was meant to punish him for his upholding law and, so as to waiver in the future. He refused to waiver. Thus, premature and unfair termination was unleashed.

63. Thus, for avoidance of doubt, the Court clarifies that the claimant's established discrimination under section 82(2) of the Former Constitution of Kenya was on account of his political opinion as was envisaged in section 82(3) of the Former Constitution. The Court clarifies that the judgment in place as delivered on 22.07.2022 be construed accordingly." The Court returns that discrimination was thus established for the claimant in that regards. In particular, section 5 of the *Employment Act*.2007 imposed a duty upon the respondent to promote equal opportunity in employment and to strive to eliminate discrimination in its employment policy or practice. The section also required the respondent not to discriminate directly or indirectly against an employee, inter alia, in respect of terms and conditions of employment, termination of employment or other matters arising out of employment. The Court has found that the claimant's actions in failing to implement the impugned CEO's instruction was correctly calculated to ensure that the respondent upholds that provision by not resolving the discrepancies in the staff salaries in a discriminatory manner. While the claimant was acting in accordance with the section, the respondent implemented a design, through the disciplinary processes and action against the claimant, that the Court finds amounted to discrimination under

section 5 (3) (a) of the *Employment Act* on grounds of political opinion and belief that the delivery by the claimant as the Chief Finance Officer had to adhere to principles of good governance as consistent with the relevant provisions of *the Constitution*, statutes and the public officer code of conduct and ethics. The declaration will issue that the termination amounted to discrimination.

64. The, claimant also prays that the Court issues a declaration that the termination stands rescinded. An order of rescission would issue to render a contract or decision null and void so that it is no longer recognized as binding upon the parties, returning parties to a situation as if the decision was not made at all. The termination was the respondent's unconstitutional and unlawful decision. It was in violation of Articles 27 and 236(a) of *the Constitution* and in breach of section 5 of the *Employment Act*. To that extent, the court considers a declaration that it is rescinded would go to show that it was null and void. The declaration will issue that the termination of the claimant's employment with HELB was wrongful, unfair and discriminatory and null and void or is rescinded.

b. The claimant prayed that he be reinstated as the Chief Finance Officer of the respondent. It was submitted for the respondent that section 12(3) (vii) of the *Employment and Labour Relations Court Act* provides that the remedy of reinstatement may be awarded within 3 years of the dismissal. Further, the claimant was terminated on 27.09.2019 and more than three years have since lapsed and therefore under the provisions of the Act, the remedy was no longer available. The respondent relied upon the Court of Appeal judgment in Sotik Highlands Tea Estates -Versus- Kenya Plantation and Agricultural Workers Union [2017] eKLR (G.B.M Kariuki, Sichale, and Kantai, JJA) where it was held that an order of reinstatement should not be given except in very exceptional circumstances. Further, that in view of that statutory provision, the Court does not have jurisdiction to grant reinstatement - where a period of three years has lapsed from the date of termination or dismissal in issue. For the claimant it is submitted that after the termination he promptly filed the suit under a certificate of urgency. Further, it was not for his fault that the suit was not heard and determined within three years from the date of his termination. That the prompt hearing was impeded by numerous factors such as the Covid-19 pandemic and trial delays through adjournments. The current respondent's CEO was set to retire in March, 2024 and it was known that the position of Chief Finance Officer was vacant. In a manner to acknowledge the time barring of the order of reinstatement, it was submitted for the claimant thus, "42. If it were not for having been out for over three years from the time of termination, this would have been a perfect case for reinstatement. 43. For the foregoing reasons, the claimant prays to the Court that he be re-engaged to the currently vacant position in the respondent's establishment or a similar position, and that the Board be ordered to backdate his salary from the date of his termination." It was submitted that the Court should follow the holding by Mbaru J in Benedict Abonyo Omollo -Versus- Judiciary and 2 Others Cause No.47 of 2015 thus, "Taking into account the primary remedy sought, the wishes of the claimant and the circumstances leading to his summary dismissal and the remedy of reinstatement overtaken in time, re-engagement is open to redress his case which re-engagement is not limited in time pursuant to Section 12(3) (vii) unlike the statutory specificity in reinstatement. Such re-engagement shall restore the claimant back to employment and the unfairness visited against him by the respondents who shall place him accordingly." It was submitted that the circumstances in the present case warranted that the claimant be re-engaged. For the respondent it was submitted that the claimant would, if reinstated or re-engaged, be required to work together with RW, the respondent's CEO and the claimant had already indicated that he was not ready to take instructions from the CEO – but a proposition the Court already found not to be true because the finding is that the claimant, correctly so, declined or refused to implement an unlawful or irregular order by the

CEO. It was submitted that the claimant had failed to show mitigating steps taken through seeking alternative employment – but for the claimant, it was urged that the claimant was approaching the retirement age and his professional stature had been adversely fractured by the termination making it impossible or difficult to acquire alternative employment. It was submitted for the respondent that employment was based on mutual trust and confidence which once it had been eroded like in the instant case, workplace relationships would be strained leading to unfavourable and undesirable workplace environment. It was concluded for the respondent that in the circumstances, considering the factors in section 49(4) (a) to (m) and section 50 of the *Employment Act*, the employment relationship should not be revived between the parties. The Court has considered the submissions and indeed, this appears a proper case for reinstatement but for the lapsing of the three statutory years of limitation in issue. But also, it appears that the claimant did not specifically pray for re-engagement. While purporting to urge for re-engagement the claimant cited Judicial Service Commission and Another -Versus- Lucy Muthoni Njora (Civil Appeal 486 of 2019) [2021] KECA 366 (KLR) (7 May 2021) (Judgment) where the Court of Appeal (PO Kiage, SG Kairu & F Sichale, JJA) held that once a dismissal decision involving a state officer was adjudged unlawful, null and void, reinstatement was an automatic remedy and the trial Court had made no error in making the order of reinstatement. The Court considers that the holding applies to public officers generally especially that Parliament has made legislation such as has been cited by the claimant applying same standards of leadership and integrity upon public officers and as is envisaged in Article 80 (c) and 232(3) of *the Constitution*. In that cited Njora case, the order of reinstatement had been made on 15.06.2016 in circumstances that the effective date of the dismissal had been on 20.09.2019, being outside the three years of statutory limitation for reinstatement. Thus, there appears two opinions from the Court of Appeal one suggesting there must be no reinstatement after lapsing of three years from the termination or dismissal and the other that despite lapsing of the three years of limitation, reinstatement may nevertheless issue if the termination, like in the instant case, is found null and void or rescinded.

The Court considers that the overriding provision in the instant case is Article 236 (a) of *the Constitution* that a public officer shall not be victimised or discriminated against for having performed the functions of office in accordance with *the Constitution* or any other law. The claimant's contract of service has been found to have been terminated but for no any other reason but that he had performed his duties in accordance with applicable law. In the circumstance, in view of the overriding mandatory provision and the holding in Judicial Service Commission and Another -Versus- Lucy Muthoni Njora (Civil Appeal 486 of 2019) [2021] KECA 366 (KLR) (7 May 2021) (Judgment) that once the termination is found null and void, then the officer should be reinstated, the remedy of automatic reinstatement will issue. It is essential to be made clear to the government persons that a public officer is expressly protected under Article 236 of *the Constitution* and it cannot be that those who offend *the Constitution* and statutes remain in public or state service while those who, with whole dedication fulfil allegiance and fidelity to *the Constitution* and laws are denied from serving the people. It cannot be that the claimant gives way upon a submission that there is lost trust and confidence with the CEO and members of the respondent Board yet the claimant's termination has been found unfair, unlawful, and offensive of statutory and Constitutional provisions as urged for the claimant as is a nullity. As a matter of legal principle and as per the holding by the Court of Appeal, once the termination or dismissal is found null and void then reinstatement in the public service becomes automatic, as it appears to the Court in the instant case, unless good reason is shown in view of the factors such as are provided in section 49 as read with section 50 of the *Employment Act* operate as a bar to granting automatic reinstatement.

The finding of nullity appears to render the dismissal or termination vacuous as emptiness so that without any overt action, in the words of the Court of Appeal, a situation of reinstatement is then automatic. Thus, the order of nullity essentially puts parties to a position as though no dismissal or termination occurred - the automatic reinstatement; defeating the time baring in section 12 (3) (vii) as appears to have been the holding in Judicial Service Commission and Another -Versus- Lucy Muthoni Njora (Civil Appeal 486 of 2019) [2021] KECA 366 (KLR) (7 May 2021) (Judgment).

The Court has well considered the holding in New Zealand Educational Institute –Versus- Board of Trustees of Auckland Normal Intermediate Schools [1994]2 ERNZ 414 (CA) where it was stated thus, "Whether...it would be practicable to reinstate [the employee] involves a balancing of interests of the parties and justices of their cases with regard not only to the past but more particularly to the future. It is not uncommon for this Court or its predecessor, having found a dismissal to have been unjustified, to nevertheless conclude on the evidence that it would be inappropriate in the sense of being impracticable to reinstate the employment relationship. Practicability is capability of being carried out in action, feasibility or the potential for the re-imposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence." The Court considers that an automatic reinstatement as a consequence of a null and void termination or dismissal is a term of art. It is a description of a finding of a nullity of the termination or dismissal in a sense that it is a situation strictly outside the meaning of an order of reinstatement as envisaged in section 49 of the *Employment Act*, 2007 and section 12 (3)(vii) of the *Employment and Labour Relations Court Act*, 2011. It is that because the termination is found null and void or is rescinded in the words of the claimant herein, the impugned termination for all purposes never was and the parties must then be deemed to continue in the employment relationship per prevailing terms and conditions of the employment – a scenario very much like it obtains when a classical reinstatement order is made. Automatic reinstatement then is an emphatic position that in view of a finding that a termination or dismissal is a nullity, unless for good reason, the parties continue in the relationship per prevailing terms of the contract of employment. While considerations in section 49 of the *Employment Act*, 2007 and section 12 (3)(vii) of the *Employment and Labour Relations Court Act*, 2011 may assist in evaluating whether there is a bar for a claimant from continuing in employment consequential to a finding of nullity of the impugned termination or dismissal, the statutory provisions are not the binding strict guiding principles in determining the impact of such finding of a nullity to the continuation of the contract of service. The statutory time of limitation of three years from the date of impugned termination or dismissal does not then apply as to diminish the Court's jurisdiction to order continued employment relation between the parties as a consequence of the finding that the termination or dismissal was a nullity. But admittedly, even after a finding of nullity of a termination or dismissal, there may, in the Court's view, exist a bar to continuation of the employment relationship. Such bar may include events happening after the termination that render the continuation of the relationship impossible such as abolition of the office held, completion of the work subject of the contract of service, either party ceasing to exist or death, bankruptcy or insolvency. In the present case, it appears that no bar has been established.

In the instant case, the office of Chief Finance Officer flowing from the claimant's termination is still vacant per material on record. The claimant is a professional and nothing is shown as diminishing his capacity to deliver in that office. The Court considers that it is in the best public interest that public officers who act in accordance with *the Constitution*, statutes, and, public service code of conduct and ethics, are protected from discrimination and victimization. It is

the Court's consideration that assurance is given to public officers that as far as possible the Court, *the Constitution*, and the laws will protect their continued public service as envisaged in Article 236 (a) and consequential to their termination being found a nullity after they have performed duty per Constitution or law, unless a compelling bar is shown, they will continue in public office under the doctrine of automatic reinstatement on account of nullity of the termination or dismissal as enunciated in the cited judgment by the Court of Appeal. In making that holding, the Court makes a clear line distinction between a termination that is null and void, like in the instant case, and a termination that is merely unfair or unlawful on account of considerations such as is envisaged in sections 41, 43, 45 and 46 of the *Employment Act*. In the instant case provisions of Articles 2 and 236(a) when read together render the termination null and void. Article 2 declares that *the Constitution* is the supreme law of the Republic and binds all persons and all State organs at both levels of Government. Further, no person may claim or exercise State authority except as authorised under *the Constitution*. Further, the validity of *the Constitution* is not subject to challenge by or before any court or other State organ. The Article then declares that any law, including customary law, that is inconsistent with *the Constitution* is void to the extent of the inconsistency, and any act or omission in contravention of *the Constitution* is invalid. The respondent acted in violation of the express constitutional provision in Article 236(a) which is in mandatory terms that a public officer shall not be victimised or discriminated against for having performed the functions of office in accordance with *the Constitution* or any other law. The Court has found the termination to have been an act that was null and void in terms of Article 2 of *the Constitution*. Thus, upon that finding, and upon no justifiable bar shown, the claimant must revert to the office held as the termination was like it never was, but, a void. The claimant was terminated effective 27.09.2019 to the current month of November 2023 being 50 months making a resultant back payment of gross monthly salary Kshs.524,941.09 x 50 months = Kshs.26,247,054.50 payable less PAYE and the claimant to continue in employment of the respondent as Chief Finance Officer with attendant remuneration and benefits so as to be deployed forthwith and the claimant be treated as though the contract of employment had not been terminated at all. The Court returns accordingly.

c. It is prayed that the claimant should be paid damages for wrongful termination and discrimination in terms of the *Employment Act* 2007. The Court has considered section 49 of the *Employment Act*. Where termination or dismissal is unjustified the employee may be paid a maximum of 12 months' gross salaries less PAYE. Further, where the termination or dismissal is unfair, the employee may be reinstated and treated in all respects as if the contract of employment had not been terminated. The Court considers that reinstatement having been awarded, the award of compensation appears sufficiently served. Further, but for the awarded order of reinstatement, in view of the enumerated findings of unfairness, breach of the law and, violations of *the Constitution*, the Court returns that the case would be a proper case for an award of maximum compensation of 12 months' gross salaries. That is more so taking into account the claimant's clean service since he was employed by the respondent until the termination.

Turning to compensation for discrimination, the Court has already found that the claimant was discriminated and victimized for performing his duty in accordance with the relevant provisions of *the Constitution* and statutes. He was punished for upholding values and principles of public service in Article 232 of *the Constitution* and for upholding the statutory values or standards of his profession as a Chief Finance Officer, and, for upholding the public service code of conduct and ethics that applied to his public service as a Chief Finance Officer.

It was submitted for the claimant that he had been selectively terminated in circumstances that other officers who like him had declined to sign and approve the salary increment including the Chief Operations Officer and the Finance Manager were not punished in the like manner. Further, while the Finance Manager was issued a letter to show cause, she appears not to have undergone the disciplinary process and no action was taken against her as she was still in the service of the respondent as at hearing of the suit and per RW's testimony. RW confirmed the Finance manager was still working for the respondent. The Court returns that as earlier found, the claimant was discriminated against in breach of section 5 of the *Employment Act* and Articles 27 and 236(a) of *the Constitution* as earlier found in this Judgment.

In Masoud -Versus – Kenya Revenue Authority (Cause 906 of 2016) [2022]KEELRC1393 (KLR) (22 July 2022) (Judgment) the Court held as follows, " By that elaborate testimony, the Court finds that the claimant has established that first, the reason for termination was unfair and not genuine, second he was targeted for performing his duties in accordance with the law and his official authority as employed by the respondent, and, by that reason he was victimized and punished in exclusion of the other officers he has established appear to have failed in their responsibilities and duty. The claimant has also shown that he was denied equal enjoyment of the due process and safeguards under the respondent's Code of Conduct, Rules and Regulations. The claimant has further shown that by the respondent's letter dated 16.03.1998 and his reply thereto dated 24.03.1998, the respondent had elected to mistreat the claimant in a discriminatory manner. The Court returns that the claimant suffered inequity, in-equality, unfairness, mistreatment and all of which amounted to discrimination as envisage in section 82(2) of the Former Constitution of Kenya. The Court has considered the claimant's long service and his resolution to otherwise be an honest public officer keen to act in the best respondent's interests. He lost his employment in the most unfair and oppressive manner. He begged the respondent to retain him in the service but as the evidence shows that it had been predetermined that he had to be terminated from public service. The circumstances were that claimant had spent all his working life building his career with the Government in the unique specialty of revenue collection but the respondent suddenly ended the claimant's legitimate expectation to continue in employment to glorious retirement after the full realization his potential in his chosen career. It was most discriminatory, unfair and unjust. The court returns that the respondent will pay the claimant a sum of Kshs.15,000,000 to vindicate that violation of his fundamental freedom from discrimination as was protected under the Former Constitution which was in force at the material time. While making that award the Court upholds the claimant's submission that a public body such as the respondent by its agents or employees must not indulge in facilitating, aiding and abetting grant corruption and if such indulgence appears to take place and the public body fails to prove that it did not deliberately fail to discharge its responsibilities according to its mandate, then the victim of the public body must be protected and adequately compensated. The Court in awarding the compensation has also considered that in absence of any other evidence the claimant appears to have been targeted and so discriminated against for performing his duties. The Court further reckons that the war on corruption shall not only be won by punishing perpetrators but also by protecting and judiciously rewarding the anti-corruption soldiers. It is the Court's view that public officers who act in accordance with the values and principles of public service, integrity and honesty will receive protection and exoneration by the courts in event of victimization for their ethical and virtuous performance towards protection of public interest. Further, the Court holds that the award is not made to punish the respondent as no punitive damages were prayed for. It is made and meant to make up the harm the claimant has suffered as flowing from the unfair discrimination and treatment." The Court considers that the instant case is

substantially similar to that cited case. The Court has considered the award of an order of automatic reinstatement for the unfair termination and its full monetary consequence. In that consideration the Court returns that a sum of Kshs.10,000,000.00 will serve for the manner the claimant was discriminated and victimized. While making that award, the Court has as well considered that the claimant went out of his way to report the issue to the Ethics and Anti-Corruption Commission towards, not only vindicating himself of the harsh discrimination, but as well as protecting *the Constitution*, law and public interest. The award should serve as just reparation or atonement for the unjustified and glaring manner the claimant was discriminated and as envisaged in Articles 23(3) (e) and 19 (2) (b) as read with section 12 (3) (vi) and of the *Employment and Labour Relations Court Act*, 2011 as well as section 5 of the *Employment Act*.

d. The claimant is awarded costs of the suit as he is successful in his claims and prayers.

65. In conclusion judgment is hereby entered for the claimant against the respondent for:

1. The declaration hereby issued that the termination of the claimant's employment with HELB was wrongful, unfair, discriminatory and null and void or rescinded.

2. Consequential to order (1) above, the order of automatic reinstatement or continuation of the contract of employment of the claimant effective the date of the termination with full back payment of Kshs.Kshs.26,247,054.50 payable less PAYE and the claimant to continue in employment of the respondent as Chief Finance Officer with attendant remuneration and benefits and to be deployed forthwith and the claimant be treated by the respondent as if the contract of employment had not been terminated at all.

3. The respondent to pay the claimant a sum of Kshs.10,000,000.00 being compensation for discrimination.

4. The sum of money in orders (2) and (3) above be payable by 31.03.2024 failing interest to be payable thereon at court rates from the date of this judgment until full payment.

5. The respondent to pay the claimant's costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 16TH NOVEMBER, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE