



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**  
**AT NAIROBI**

**CAUSE NO. 455 OF 2015**

*(Before Hon. Justice Ocharo Kebira on 17<sup>th</sup> January 2022)*

**DAVID MAINA GACHANJA.....CLAIMANT**

**VERSUS**

**HON. ESTHER NYAMBURA GATHOGO.....1<sup>ST</sup> RESPONDENT**

**PARLIAMENTARY SERVICE COMMISSION.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant herein, through a statement of claim dated 24<sup>th</sup> March 2015, sued the Respondents jointly and severally, seeking for the following reliefs:

- a) Unpaid salaries of Kshs. 475,000.
- b) Two months' salary in lieu of notice.
- c) Prorated leave.
- d) 4 months post-election (handing over) period pay.
- e) Gratuity @ 25% per annum for 5 years.
- f) Damages computed on the unserved contracts period of 5 years.
- g) Costs of this claim.
- h) Interest on (a) to (g) above.
- i) Such further or other relief that this Honourable court may deem just.

2. The Respondents did enter appearance and file a joint statement of defence dated 20<sup>th</sup> April 2015, denying the Claimant's claim and his entitlement to the reliefs sought.

3. Another statement of defence dated 29<sup>th</sup> May 2015, purportedly, under protest for the 2<sup>nd</sup> Respondent was filed on the 29<sup>th</sup> May 2015 wherein the Claimant's claim was denied in toto.

4. Pursuant to the leave of court, granted on the 17<sup>th</sup> March 2016, the 1<sup>st</sup> Respondent filed an amended statement of defence on the 22<sup>nd</sup> March 2016. The amendment attracted the amendment of the statement of claim. The Claimant filed an amended statement of claim on the 7<sup>th</sup> April 2016. The 1<sup>st</sup> Respondent amended hers on the 31<sup>st</sup> October 2018.

5. At the close of pleadings, the matter got destined for hearing *inter-partes*. The same was heard on the 18<sup>th</sup> October 2021, when the Claimant testified. The Respondents did not offer any evidence.

### **The Claimant's case**

6. At the hearing, the Claimant opted to adopt the contents of his witness statement dated 24<sup>th</sup> March 2015 and the documents that were filed under his lists of documents dated 24<sup>th</sup> March 2015, and 7<sup>th</sup> April 2016 as his evidence in chief and documentary, respectively. He gave brief oral evidence in clarification of the contents of the witness statement.

7. The Claimant stated that the 1<sup>st</sup> Respondent was a Member of parliament for Ruiru Constituency during the material time and that he was employed as the Constituency Manager and her personal assistant.

8. The Claimant contended that the 1<sup>st</sup> Respondent was at the material time mandated by law to enter into contracts of employment of with such persons that were to serve as constitutional office staff and personal assistants and the 2<sup>nd</sup> Respondent to approve and pay remuneration to such staff.

9. The Claimant contended that on or about the 1<sup>st</sup> April, 2013 the 1<sup>st</sup> Respondent employed him as a personal assistant as well as Constituency Office Manager at a monthly salary of Kshs. 95,000. This through a letter of appointment dated the even date. The letter expressed that he was being appointed pursuant to the terms, rules and conditions stipulated under legal Notice number 77 of 2000 and the Parliamentary Service Regulations 2005. He was entitled to 21 days annual leave.

10. Through a letter dated 25<sup>th</sup> April 2013, he was informed of his employment. Prior to this letter there was another letter dated 23<sup>rd</sup> April 2013 that the 1<sup>st</sup> Respondent had addressed to the clerk of the National Assembly urging that office to issue the Claimant and another, with Parliament entry passes.

11. The Claimant asserted that on the 12<sup>th</sup> August 2013, he reported for duty as usual but was barred from accessing his office by security on orders from the 1<sup>st</sup> Respondent. His efforts to meet the 1<sup>st</sup> Respondent over the matter, were without success. His correspondences to the 2<sup>nd</sup> Respondent over the matter did not attract any response.

12. Therefore, his employment came to an end on the 12<sup>th</sup> August 2013.

13. He contended that between April 2013 to August 2013 he reported on duty daily. He worked without his salary being paid.

14. The Claimant remembers that at around the time he was employed, there was a controversy over salaries between the SRC (Salaries Remuneration Commission) and Parliament. The controversy took like 5 (five) months to be resolved. During all that time the constituency staff were told to wait for a resolution. Eventually, the money was released in lumpsum for payment of salaries, and it is at this time that he was terminated before receiving his salary.

15. On the 2<sup>nd</sup> Respondent's contention that the Claimant was not their employee at any time, the Claimant urged court to consider the letter of appointment and the fact therein that he was appointed pursuant to the Parliamentary Regulations. The clause dealing with separation in the Regulations (page 8 item 4 (13) forms the basis for liability against the 2<sup>nd</sup> Respondent.

16. The Claimant asserted that the allegation by the 1<sup>st</sup> Respondent that he did not report to office is untrue. The documents in his supplementary bundle of documents, demonstrate that during the time he had meetings with her. The document dated 25<sup>th</sup> April 2013 is signed by her and the Claimant.

17. The Claimant wrapped it up by stating that he is entitled to the reliefs he sought in his pleadings.

### **The Claimant's submissions**

18. Counsel for the Claimant submitted that the 1<sup>st</sup> Respondent in her pleadings denied that the Claimant was employed as her Constituency Manager. In light of the appointment letter and the other documents produced by him, he urged court to find that the Claimant's evidence was not rebutted by her. The court should not give her pleadings any attention.

19. Explaining the nexus between the 1<sup>st</sup> and 2<sup>nd</sup> Respondent in this matter, counsel stated that Article 4 of the Regulations, the and Legal Notice required the 2<sup>nd</sup> Respondent to employ staff whose remuneration may not exceed a specified budget.

20. It was further submitted on the connection, that the 2<sup>nd</sup> Respondent was the "paymaster" so to speak. It remits funds that pay staff salaries for constituency offices staff. Reason why it must be informed every time a staff Member is retained or dismissed.

21. Counsel submitted that Article 4.13 (IV) of the Regulations requires 2<sup>nd</sup> Respondent to settle any award made to an employee of a constituency office by any court on account of unfair dismissal. The rule states:

*"Any award by an arbitrator or a court for unfair dismissal borne by the constituency or senator county/women rep office(s) shall be deducted by the Commission from allocation of that particular constituency or senator county/women representative County office."*

22. It was submitted that the employment of the Claimant was terminated on the 12<sup>th</sup> August by word of mouth. The termination lacked legality. It was a callous insensitive act, and a blatant abuse of power and authority on the part of the 1<sup>st</sup> Respondent.

23. The termination was not in conformity with the stringent requirements of section 41 of the Employment Act, putting reliance on the decision in **Mary Chemweno Kiptui -vs- Kenya Pipeline Company Limited, Cause No. 435 of 2013 (eKLR)** where the court held:

*“Section 41 of the Employment Act is coached in mandatory terms. Where an employer fails to follow those mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employer has not been accorded a hearing in the presence of the union representative or in the presence of a fellow employee of their choice.*

*The situation is dire where such an employee is terminated after such a flawed process without a hearing as such termination is ultimately unfair. The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognizance of the fair hearing principles as well as natural justice tenets.”*

The dismissal was unlawful.

24. On the reliefs counsel submitted that since the termination was unlawful and unfair, this court should grant the Claimant a compensatory relief pursuant to section 49 (1) (c) of the Employment Act. He argues that in determining the extent of the award, this court should be guided by the unique circumstances of a particular case. In this matter that the Claimant worked without pay for 4 (four) months, patiently waiting as the Respondents put their house in order, so as to be able to remit his wages. Instead of remitting the wages he was dismissed on instructions given through security guards, who were his junior. Therefore, the court should consider the manner the decision to terminate was communicated.

25. The court was urged to be persuaded by the decision in **Fredrick Odeke were -vs- West Kenya Sugar Company Limited (2020) eKLR**, where in awarding a 10 months' salary as compensation, the court considered that the employee's salary had been underpaid, an act it considered oppressive.

26. The Claimant worked for 5 months without pay. The salary should be paid, therefore Kshs. 475,000. He was entitled to 2 months' notice and since it was not issued, he should be paid salary in lieu of notice.

27. Counsel argued that the Claimant would have been in employment for the parliamentary term of 5 years. Thus, leave would have totaled 105 days i.e. 21 days each year for 5 years. He would have earned Kshs. 332,500 therefore.

28. It was further submitted that under Article 4:41 of the Regulations the office Manager is required to be in employment for an extra 4 months after the parliamentary term or after the Member of parliament has ceased to hold office. It is upon this premise that the Claimant seeks for payment of a sum of Kshs. 380,000 being 4 months' salary.

29. Under section 49 (1) (4) of the Employment Act, this court has been urged to grant a 12 (twelve) months' gross salary, therefore Kshs. 1,400,000.00.

30. Lastly, counsel submitted that the Claimant is entitled to gratuity computed at 25% of the annual salary for 5 years which translates to Kshs. 1,425,000.00.

31. Cumulatively, the Claimant has urged court to give him Kshs. 3,942,500.00.

### **The 2<sup>nd</sup> Respondent's submissions**

32. Counsel for the 2<sup>nd</sup> Respondent identifies two issues for determination, thus:

a) *Whether the 2<sup>nd</sup> Respondent is properly joined to this claim; and*

b) *Whether the Claimant is entitled to the reliefs from the 2<sup>nd</sup> Respondent.*

33. On whether the 2<sup>nd</sup> Respondent is properly enjoined to this claim, it was submitted that the 2<sup>nd</sup> Respondent is a constitutional Commission established under Article 127 of the Constitution of Kenya, 2010 charged with the with roles *inter alia* to provide services and facilities to ensure the effective functioning of parliament, which it does by allocating money for each Member of parliament to hire staff and operate the constituency office in their respective constituencies.

34. That the management and running of the constituency offices by Members of parliament is guided by the Parliamentary Service (Constituency officers) Regulations, 2005.

35. Regulations 22 of the Regulations provides for recruitment of the staff of the constituency office and provides that Members of parliament shall initiate recruitment of all constituency office staff and determine their terms of employment and salary scales.

36. Counsel further submitted that pursuant to Regulations 22, the onus to select and recruit a Member of staff is on the Member of parliament. The 2<sup>nd</sup> Respondent only comes in once the Member of parliament has identified his/her staff and only after the parties have

signed an employment contract that is submitted together with a schedule of names of all employees that the Member of parliament intends to work with. The 2<sup>nd</sup> Respondent does not involve itself in the choice of staff and terms of engagement of the personal staff of Members of parliament. The 2<sup>nd</sup> Respondent merely allocates money to each constituency office to pay for the staff recruited.

37. It was argued that there is no privity of contract between the 2<sup>nd</sup> Respondent and the Claimant. To buttress this, counsel placed reliance in **ZEPHIR HOLDING LIMITED -VS- MIMOSA PLANTATIONS LIMITED, JEREMIAH MATAGAKO & EZEKIEL MUSANGO MUTISYA [2014] eKLR**, stating that therein the court defined a proper party thus:

*“[7] A proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant under Order 1 rule 1 and 2 respectively, or as a third party or as an interested party and whose presence is necessary or relevant for determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit.”*

38. And the Court of Appeal case in **Savings and Loan [K] Limited -vs- Kanyanje Karangaita Gakombe & another [2015] eKLR** where the court expressed itself as follows:

*“In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any other person that the parties to the contract. Accordingly, a contract cannot be enforced by or against a third party. In **DUNLOP PNEUMATIC TYRE CO. LIMITED -VS- SELFRIDGE & CO, LIMITED [1915] AC 847, Lord Haldase, LC rendered the principle thus:***

*“My Lords, in the law of England certain principles are fundamental, one that only a person who is a party to a contract can sue on it.”*

*In this Jurisdiction that proposition has affirmed in a line of decisions of this court, among them **Agricultural Finance Corporation -vs- Lendetia Limited [supra] Kenya National Capital Corporation Limited -vs- Albert Mario Condeiro & another [supra] and Williams Muthee Muthami -vs- Bank of Baroda [supra].***

*Thus, in **AGRICULTURE FINANCE VORPORATION -vs- LENDETTA LIMITED [supra]**, quoting with approval, from Halsbury’s Laws of England, 3<sup>rd</sup> Edition, volume 8, paragraph 110, Hansox, J.A. as he then was reiterated:*

*“As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to given him the right to sue or be sued or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such a near relationship to a party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”*

39. The 2<sup>nd</sup> Respondent’s counsel stated that Regulations 2 of the Parliamentary Service [Constituency Offices] Regulations, 2005 define “staff” to mean employee of a Member working in the constituency office and not an employee of the Parliamentary Service Commission.

40. That looking at the procedure of appointment of constituency staff, one can gain an impression that they are not employees of the Parliamentary Service Commission. Regulations 22 of the Parliamentary Service [Constituency Officer] Regulations, 2005 stipulates the process of recruitment of the constituency staff, thus:

*“Members shall, with the concurrence of the Commission, initiate recruitment of all the constituency office staff whose terms of employment and salary scales shall be determined by the Commission.”*

41. Counsel further submits that the role of the 2<sup>nd</sup> Respondent is limited to facilitating Members of parliament in their payments for salaries and allowances. The only relationship between the 2<sup>nd</sup> Respondent and the constituency office is that it provides the funds for running the constituency office, and the constituency office must submit copies of all employment contracts of staff as proof of the existence of such contracts for purposes of disbursement of funds for payment of salaries as well other qualifying expenditure of the constituency office.

42. Counsel further argued that Article 127 of the Constitution does not include staffing of constituency offices of Members of parliament. That the 2<sup>nd</sup> Respondent has no role whatsoever, on the recruitment and dismissal of the Member of parliament’s staff, because the constituency offices have their own funds and vote heads.

43. On the reliefs sought by the Claimant, counsel for the Respondent submits that he is entitled to none.

44. That pursuant to Regulations 24 of the Parliamentary Service [Constituency Officer] Regulations, the employment relationship between a constituency office staff and a Member of parliament is only evidenced by a contract executed by a Member of parliament, and a copy must be submitted to the clerk. The Claimant was never employed by the 1<sup>st</sup> Respondent and if at all he was, then the 2<sup>nd</sup> Respondent was not aware of the said arrangement between him and the 1<sup>st</sup> Respondent as there was no contract between the said parties submitted to the clerk of the National Assembly.

45. It was further submitted that the court cannot issue the orders sought against an improperly joined party. Rights and obligations arising from the claim do not attach to the 2<sup>nd</sup> Respondent. Reliance was placed on the decision in **Goodwill and Trust Investment Limited and another -vs- Witt 7 Bush Limited [2011] LNC/3820 [SC]** where the Supreme Court of Nigeria held as follows:

*“It is trite law that for a court to be competent and have jurisdiction over a matter, proper parties must be identified. Before an action can proceed, the parties to it must be shown to be the proper parties to whom the rights and obligations arising from the cause of action. The question of proper parties is a very important issue which would affect the jurisdiction of the court as it goes to the foundation of the suit in limine. Where proper parties are not before the court then the court lacks jurisdiction.”*

### **Analysis and Determination**

46. From the material placed before me and the happenings in the proceedings in regard thereto, the following issues emerge for determination:

- a) Was the Claimant employed as a Constituency Manager at any time?
- b) If the answer to (a) above is in the affirmative whose employee, was he?
- c) If the answer to (a) above is in the affirmative, was his employment terminated and if so, was the termination fair.
- d) What remedies are available to the Claimant if any?
- e) Who should be condemned to bear the costs of this suit?

### **Was the Claimant employed as a Constituency Manager at any time.**

47. The Claimant's case was that on or about the 1<sup>st</sup> April, 2013 he got employed as a personal assistant to the 1<sup>st</sup> Respondent as well as a Constituency Manager, Ruiru constituency. He tendered in evidence a letter of appointment. The letter which I have considered clearly indicated that the appointment was pursuant to Legal Notice Number 77 of 2000 and parliamentary Service Regulations as amended. The letter did put forth terms of engagement inter alia, salary, Kshs. 95,000 and leave, 21 days annually.

48. To further demonstrate that he was employed in the capacity hereinabove state, he produced a letter dated 23<sup>rd</sup> April 2013, by the 1<sup>st</sup> Respondent addressed to Sergeant at Arms of the National Assembly, requesting the latter to issue, the Claimant and one Mr. Michael Kabuga Muhoro [driver], with entry passes. Under the supplementary list of documents, he placed before court inter alia, extracts from the constituency diary [hand written] signed by the 1<sup>st</sup> Respondent and him, and profiles for constituency office staff that he received in the course of discharging his duties.

49. The Respondents did not place any evidence before this court to counter the Claimant's and support the respective positions taken in their pleadings. There is now firm jurisprudence that pleadings are never a substitute for evidence. That a failure on the part of any party to lead evidence on the pleadings, only leaves the pleadings as mere statements and courts will always treat the pleadings as such statements and no more.

50. By reason of the above premises, I am convinced that the Claimant was employed in the capacity herein-above stated and that he discharged duties as such during the material times to this suit.

### **Whose employee was the Claimant?**

51. As stated hereinabove, the Claimant was appointed pursuant to the Parliamentary Service [Constituency Offices] Regulations, 2005. The Regulations were made pursuant to the provisions of section 36 of the Parliamentary Service Act [No. 10 of 2000]. It is my view consequently, that in order for one to fully understand the Regulations and their import, one cannot afford to read the Regulations in isolation from the provisions of the Act. Counsel for the parties in their submissions appear to have read the Regulations in isolation from the provisions of the Act under which they were coined, giving them a blurred view of the relationship between the Claimant and the Respondents.

52. Section 36 of the parliamentary Service Act provides:

*“1. The Commission may make Regulations for prescribing anything required by this Act to be prescribed and generally for better carrying out of the purposes of this Act.*

*2. Without prejudice to the generality of subsection [1] Regulations under this Act may provide for –*

- a) *The conduct of the business of the Commission.*
- b) *The administration and management of the services and facilities.*
- c) *The terms and conditions of service, pension and other retirement benefits of employees.*
- d) *The measures for the discipline of employees.*
- e) *The financial procedures of the Commission;*

3. ....

53. It is imperative to state that this Act was repealed and replaced by the Parliamentary Service Act 2019 to bring into alignment that which it covered with the 2010 Constitution. However, for purposes of this claim the repealed Act is applicable. The cause of action arose under the same.

54. The Act defines “Services and facilities” to include all means by which Members of the National Assembly are officially assisted in the performing of their parliamentary duties. I have no doubt in my mind that parliamentary service [constituency offices] Regulations, 2005, were made to enable adequate provision of the means to the Members by the Commission.

55. It is disturbing that counsel for the Claimant decided to anchor his submissions on draft Regulations, and not the Regulations that came into effect, and that were applicable to his client’s [the Claimant’s] case. One would definitely find it difficult to understand counsel’s conduct, but easy to imply the desire on his part, to mislead the court. Having said this and with due respect, I find the Claimant’s submissions on this issue not very helpful.

56. The Parliamentary Service does not specifically establish the “constituency staff.” The establishment is by the Regulations, which are subsidiary legislation. The Regulations being such, must in its provisions be in accord with the parent Act and other statutes that deal with matters that are related with what it [the Regulations] provide for, and not contradictory. For instance, the Regulations cannot accord a definition, or meaning to a word in a manner that clearly is in conflict with what obtains in statute[s] over same word.

57. Counsel for the Respondent argued that the 2<sup>nd</sup> Respondent was not at any time an employer of the Claimant. This argument flows from her understanding of Regulations 2 and 22 of the Parliamentary Services [Constituency Office] Regulations, 2005, as I see it, Counsel submitted that Regulations 2 defines “staff” to mean employees of a Member working in the constituency office.

58. Counsel further argued that the procedure for employment of the constituency staff clearly does not place them under the ambit of employees of the Commission [2<sup>nd</sup> Respondent]. Looking at the submissions, one gains an inevitable impression that the conclusion that there was no employer-employee relationship between the 2<sup>nd</sup> Respondent and the Claimant as made by counsel is as a result of the literalist-cum internationalist approach of interpretation that he has given the Regulations instead of a purpose seeking approach.

59. **Wallis J. in National Joint Municipal Pension Fund -vs- Endumeni Municipality [2012] 2 ACC 262 [SCA]**, stated and I am persuaded, that:

*“The apparent purpose of a provision and the contest in which it occurs will be important guide to the correct interpretation. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will not satisfy the broader operation of the legislation or contract under consideration.”*

[emphasis mine].

60. To try and accord meaning to the relationship that were between the two by considering only two Regulations in isolation from the others, and other known relevant statutory provisions as Counsel did, could definitely lead to an impractical conclusion, and stultify the broad operation of legislation within the sphere of labour relations.

61. The purposive approach will always look beyond the manifestation of intention. It finds foundation in the fact that a legislation is a legislative communication between the legislature and the public that is inherently purposive. The interpreter must endeavor to infer the design or purpose which lies behind legislation. In order to do this the interpreter should make use of an un qualified contextual approach, which allows unconditional examination of all internal and external sources – **Devanish, interpretation of statutes, 36.**

62. I state the above, conscious of the fact that a purposive approach is not a licence to ignore a clear language of a statute.

63. The office of a Member of Parliament is a political office. Using the contextual approach, one cannot fail to appreciate why such a Member has to be involved in the initiation of recruitment of the constituency staff. The discharge of his/her mandate requires the support of persons who share in his/her political philosophy.

64. It is not true that the 2<sup>nd</sup> Respondent has no role in the recruitment of constituency staff as its Counsel argues. Regulations 22 which provides for recruitment of constituency staff provides:

*“Members shall, with the concurrence of the Commission, initiate recruitment of all constituency staff whose terms of employment and salary scales shall be determined by the Commission.”*

[emphasis mine]

65. Looking at this provision, I have no doubt that the role of the Member of the National Assembly in the recruitment of constituency office staff is a limited role, it is not in regard to the entire process.

66. Initiation of the recruitment process cannot be equated to the entire recruitment process, for initiation means to commence or begin. If it

was the intention of the drafters of the Regulations that the Member was to recruit, put in another way be in charge of the recruitment process, to the exclusion of the 2<sup>nd</sup> Respondent or any other person, nothing would have been easier than to so clearly provide.

67. The term concurrence in the provision is not used for ornamental purposes, it shows how deep and firmly the Commission is engaged in the employment of the constituency staff. Concurrence means agreement, the recruitment process contemplated under the Regulations cannot be without a go ahead signal by the Parliamentary Service Commission. The Commission determines the remuneration of the staff, not the Member of Parliament. One cannot see any other capacity in which the Commission can make the determination other than in that of an employer.

68. A determination as to who the employer of the Claimant was, cannot be sufficiently determined without considering his functions and duties that were under the Regulations, and how in his functions and duties he related with the Respondents. Regulations 14 provides:

*“At the commencement of every financial year, the Constituency Manager shall be issued with an authority to incur expenditure by the clerk [emphasis mine] for the approved budget in respect of that constituency for that financial year .....*”.

16. *At regular intervals, the supporting documents for expenditure shall be lodged with the clerk for reimbursement.*

18. *an account approval by the Commission shall be opened for every constituency with a reputable commercial bank at the nearest location from the constituency office.*

69. Regulations 29 provides:

*“1. It shall be the responsibility of the Constituency Office Manager to –*

*a) Provide administrative and institutional support to a Member.*

*b) Keep the Members well informed about the transactions of the constituency bank accounts established under Regulations 18.*

*c) Conduct official correspondence.*

*d) Prioritize incoming mail and enquiries.*

*e) Undertake general office management; and*

*f) Maintain a Member’s diary at the constituency office by recording all major constituency events that require the Member’s attention.”*

70. From the fore-cited Regulations 14, 16,18 and 29, it clearly comes out that it was intended that the Constituency Manager renders services to the Commission, and be under its control, over the rendering of those services through the clerk, and render services to the Member, respectively.

Regulations 30 provides:

*“When the office of a Member falls vacant, the Constituency Manager shall be responsible for running the constituency office until a new Member is elected.”*

71. I am of the view that during the period contemplated under the stated Regulations, the Manager remains an employee of someone, and definitely the Commission.

Regulations 36 provides:

*“36. The clerk shall satisfy himself that all the handing over procedures have been fully complied with before making last payment salaries and allowances, if any, to the out-going Constituency Office Manager. And other staff.”*

72. From this Regulations it is clear that payment of salaries and allowances, for the Constituency Manager and alleged staff is the responsibility of the clerk, and therefore the Commission.

73. This court has deliberately put forth the provisions expansively with an aim of demonstrating that applying the traditional tests of establishing whether one is an employee of another, it can be safely concluded that the Respondents were joint employees of the Claimant.

74. In sum, it cannot be correct for one to just pick the meaning accorded to the term “staff” under the interpretations section of the Regulations to determine who the employer of the staff is. This might lead to absurdity for instance where employees will be constrained to sue former Members of Parliament personally as if the services, they were rendering weren’t to the public. It will also lead to inconsistency, more especially if one has to read the whole legislation [Regulations] not reading the provisions therein in isolation from each other.

75. I agree entirely with Justice Rika when he states that:

*“71. Constituency offices are public offices, financed from the exchequer. They are not private offices of Members of Parliament. Constituency office staff cannot be equated to private employees such as Domestic Servants of Members of Parliament. The Members of Parliament are probably paid an allowance to employ Domestic Servants, and there can be no doubt on the nature of the contracts between Members of Parliament and their private employees, such as Domestic servants. The constituency office is not a private domestic set up. It is a public office. It is central to the efficient and effective functioning of Parliamentary democracy. The staff in the office discharge parliamentary roles. They are in Parliamentary Service. One co-employer authorizes another to recruit and manage the day to day functioning of the constituency office staff. One co-employer meets the costs of running the constituency office, through public funding availed to the treasury. The court does not think that the law intended employment liability that may arise from the constituency employment contract, is shouldered by the Member of Parliament – solely even after the Member of Parliament has long been thrown out of Parliament by election.”*

See **Albert Atei Onsomu -vs- Parliamentary Service Commission and another [2019] eKLR.**

76. Lastly, I need to add that by design or otherwise, of an employer, there can exist situation[s] where an employment relationship is in nature a disguised one. ‘Disguised employment relationships occur when the employer treats an individual as other than an employee in a manner that conceals his or her true legal status as an employee. Sometimes this can happen through misuse of contractual arrangements or existence of improper, or unclear legislations, as in my view is in the instant matter. The ILO Recommendation- Recommendation 198 of 2006, concerning the Employment relationships states that in such situation the determination of an employment relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties’ [article 9].

77. Just like Justice Rika, though on somewhat different grounds, I am prepared to find and I hereby do that the Respondents were joint-employers of the Claimant. The court takes cognizance of the fact that the Employment Act provides or suggests nowhere that there cannot be a joint-employers-employee relationship.

78. This Court is aware of the Court of Appeal decision in **Parliamentary Service Commission -vs- George Okoth Owuor & 2 Others**. This Court appreciates that the Court of Appeal decisions bind the Employment and Labour Relations Court. The importance and purpose of doctrine of *stare decisis*. In the circumstances of this matter including that the Respondents did not testify, and place documents that ordinarily they would be exported to place before court under the Employment Act, I am unable to conclude that the facts in the matter that were the subject of the Court of Appeal decision, were similar to the ones in the instant matter.

79. Secondly, the functions of the office of the Constituency Manager, and the duties of the bearer of that office as was in the case of the Claimant herein, in comparison with that of a security guard undoubtedly can be radically different. Their respective relationships with the Member of Parliament and the Commission too. As to whether one is an employee of the other, is largely determined by how the two parties relate to each other. For instance, what control does the other person have over the employee? Who remunerates the employee, the extent of supervision of the employee by the other person over the discharge of his tasks, are some of the factors that give the relationship the character of whether or not it is an employee-employer relationship?

80. I am of a humble view therefore, that the Court of Appeal decision doesn’t present itself as one that was meant to apply to all “staff” notwithstanding the peculiar circumstances of each relationship between the “staff”, and the Member of Parliament and the Commission.

#### **Was the Claimant’s employment terminated? and if so was the termination fair?**

81. In a dispute where an employee is contending that his or her employment was terminated wrongfully and unfairly, it is an obligation upon him to prove the act of termination. An act of termination entails some overt act on the part of the employer signaling, or from which it can be implied, that the employer has brought to an end the relationship *interse*.

82. Demonstrating the act of termination, the Claimant testified that he was at the instructions of the 1<sup>st</sup> Respondent barred from accessing his office. That he tried to have the 2<sup>nd</sup> Respondent intervene, but that did not bear any fruits. This evidence was not challenged at all. Consequently, I conclude that the Claimant’s employment was terminated.

83. In a matter like there is herein, section 43 of the Employment Act places an obligation upon the employer to prove the reason or reasons for the termination. Proving of a reason[s] can only be done by tendering evidence before the court. In this matter none of the Respondents availed evidence establishing the reason for the termination. The burden under the provision was not therefore discharged by the Respondents.

84. Any default in proving the reason for termination, leads to a conclusion that the termination was unfair in terms of section 45 of the Employment Act. In the circumstances and by dint of the stated provision, I hold that the termination was unfair.

85. Section 45 of the Act places a further obligation upon the employer to demonstrate that the reason was fair and valid. Still, by absence of evidence by the Respondents, this burden cannot be said to have been discharged.

86. Without delving further, I by reason of the premises find that the termination was unfair.

#### **What reliefs are available to the Claimant?**

87. The Claimant sought for Kshs. 475,000 under the head, unpaid salary. It was his contention that for the period he worked before the

termination, he was not paid any salary for any month worked. His evidence on this is not controverted. I accept the same. Consequently, the sum sought, Kshs. 475,000 is hereby awarded.

**88.** The Claimant further sought for two months' salary in lieu of notice, Kshs. 190,000 [One hundred and ninety thousand]. The basis for using two months in computation of notice pay by the Claimant is not clear to me. Unless, there is a contractual term on notice pay, courts of law will always award the statutory one. The Claimant's employment was terminable under the provision of section 35 of the Employment Act. Absent of the termination notice contemplated thereunder would entitle an employee to the notice pay contemplated under section 36 of the Act. The Claimant can only be entitled to a one month's salary in lieu of notice. Therefore, Kshs. 95,000 [Ninety-five thousand].

**89.** The Claimant worked for only 5 months. He can only be awarded a prorated leave pay. Therefore Kshs. 38,950.

**90.** Under Regulations 23, an employee contemplated in the Regulations was entitled to a 25% gratuity. By dint of this provision, the Claimant is entitled to a prorated amount of KES. 118,750.

**91.** Section 49 [1] of the Employment Act, bestows upon this court authority to grant a compensatory relief in favour of an employee who has successfully assailed an employer's decision to terminate his employment or summarily dismissed him, on an account that the same was unfair. The grant is discretionary which depends on the circumstances of each case. In this case, I have considered the manner in which the employment of the Claimant came to an end, the fact that his salary was not paid for all that time he worked, and the length of the period he was in the employment of the Respondents and find that he is entitled to the compensatory relief and to the extent of one month's gross salary. He is therefore awarded Kshs. 95,000.

**92.** In the upshot, judgment is hereby entered for the Claimant against the defendants jointly and severally in the following terms;

**a) A declaration that the Respondents were Co- employers of the Claimant and that the termination of his employment was substantively and procedurally unfair.**

**b) Unpaid salary for the five months, KES. 495,000.**

**c) One month's salary in lieu of notice, KES. 95,000.**

**d) Gratuity, KES. 118,750.**

**e) Leave pay, KES.38,950.**

**f) Compensation pursuant to the provisions of section 49[1][c] of the of the Employment Act,2007, KES. 95,000.**

**g) Interest from the date of filling suit till full payment at Court rates.**

**h) Costs of this suit.**

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 17<sup>TH</sup> DAY OF JANUARY, 2022.**

**OCHARO KEBIRA**

**JUDGE**

Delivered in presence of:

MR. Njuguna for the Claimant.

No appearance for the Respondent.

**ORDER**

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

A signed copy will be availed to each party upon payment of court fees.

**OCHARO KEBIRA**

**JUDGE**