Onchwari v National Authority for Campaign Against Alcohol and Drug Abuse (Cause 2036 of 2017) [2022] KEELRC 60 (KLR) (21 April 2022) (Judgment)

Neutral citation: [2022] KEELRC 60 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 2036 OF 2017

K OCHARO, J

APRIL 21, 2022

BETWEEN

ENOCH NYAKUNDI ONCHWARI ..... CLAIMANT

AND

NATIONAL AUTHORITY FOR CAMPAIGN AGAINST ALCOHOL AND DRUG ABUSE ..... RESPONDENT

JUDGMENT

Introduction

1. The Claimant was employed by the Respondent on or about the 23rd October 2013, as the Director-Finance and Administration. Owing to an interdiction of the Respondent's substantive CEO on the 8th May 2014, he was promoted to the position of Acting Chief Executive Officer. However, on or about the 24th October 2014, his contract of service got into headwinds, he was served with a notice to show cause, later on got interdicted, and eventually terminated. Holding that the termination of his employment was, unfair, and or wrongful, actuated by malice, and discriminatory, he approached this Court by way of a Memorandum of Claim dated the 10th day of October, 2017, which was later on amended on the 15th day of March 2018, pursuant to the leave of the Court.

2. In his Amended Memorandum of Claim dated the 15th day of March, 2018, the Claimant sought for the following reliefs against the Respondent;

    a. A declaration that the termination of the Claimant's service by the Respondent was unfair and unlawful.

    b) General Damages for Defamation amounting to Kshs. 5,000,000/=.

    c) Exemplary and/or Punitive Damages amounting to Kshs. 10,000,000/=.

    d) Immediate re-instatement to his last position.

e) Payment of the Claimant's salary, benefit and allowances from the date of termination up to the date of re-instatement amounting to Kshs. 13,072,012/= (being damages for breach of Contract as shown below: -

In the Alternative to d. and e. Above

(f) An acceptable Certificate of Service.

(g) Payment of the Claimant's salary, benefits and allowances for the remainder of the Contract Period (Two Years) amounting to Kshs. 13,072,012.16/= (being Damages for Breach of Contract) as shown below: -

(h) Re-engagement of the Claimant at: -

(i) Costs of the Suit.

(j) Interest on all the above from the date of Judgment till payment in full.

(k) Any other relief deemed fit to grant in the circumstances.

3. On the 14th day of March, 2018, the Respondent filed its Statement of Defence dated the 12th day of March, 2018. In the statement it denied the Claimant's claim and the reliefs sought.

The Claimant's Case

4. The Claimant's case was taken on the 23rd September 2021, when he urged the Court to adopt his Witness Statement dated the 6th day of April, 2018 (filed on 10th April, 2018), as his Evidence in Chief, and admit all the documents that he filed herein as his documentary evidence. The contents of the statement and the documents were so adopted and admitted. He briefly testified orally in Court, clarifying on the statement and the documents, before being cross examined by Counsel for the Respondent.

5. The Claimant stated that he was employed by the Respondent as Director-Financial and Administration effective 2nd November 2013. He was to be in charge of Procurement, Finance, Human Resource Management and Administration, and ICT. His starting gross salary was Kshs. 310,000 which was subsequently reviewed upwards to Kshs. 373,961. Following the interdiction of the substantive Chief Executive Officer of the Respondent, he was promoted to the position of Acting Chief Executive Officer on the 8th May 2014.

6. The Claimant contended that in the course of discharging his duties, he came across returns from M/S Ernest and Young who were the Fund Managers of Kenya shillings One Hundred Million, which had been disbursed to Community Based Organizations and Non-governmental Organizations to sensitize the public on alcohol and drug abuse. The Report had been indicated that money wired to some of those entities didn't successfully hit their accounts as those accounts which had been given by those entities were not in existence.

7. He Raised the issue with the CEO on his findings, but the latter was not happy, holding that the Claimant was interfering with the work of the fund managers. Later on, the Fund managers sent another report indicating that the accounts had been traced, and the funds released thereunto. When the Claimant asked for proof, he was given none.

8. He asserted that during his tenure, he had very little support if any from his supervisor, the CEO. Largely, the CEO made his work very difficult.

9. The Claimant asserted that at some point an Internal Audit Report was tabled before the Board Audit Committee, the report queried the hiring of the Fund Managers [Ernest and Young] and the fees they were hired at, Kshs. 17.8 Million to manage a disbursement of Kshs. 100,000 000. At this time, he was representing the CEO, in the meeting. He stated that during the meeting, he answered questions from the Directors on the anomalies that had been cited, while admitting that the anomalies indeed did exist, he gave his views anchored on his experience in public procurement, and Disposal, and knowledge of the law.

10. The Chairman of the Committee escalated the report to the Main Board. After this the CEO, accused him of not defending him on the issue in the meeting.

11. The Claimant contended that he was supposed to be confirmed to the position on the 2nd day of May 2014, but this didn't happen. When he made an inquiry from CEO, the latter told him to wait.

12. On or about the 6TH May 2014 or thereabout, there was heavy consumption of adulterated alcoholic drinks across the Country that unfortunately led to loss of many lives. In reaction, the President of the Republic of Kenya directed that the Chief Executive Officer of the Respondent, the Chief Officer of the Counter Agency and 52 County Commissioners be suspended. It is at this time that the Claimant was appointed as the Acting Chief Executive Officer to handle the crisis.

13. The situation had to be arrested, intervention measures had to be put in place, initiated by him as the Acting Chief Officer, in consultation with the Respondent's Board. The deaths were occurring at an alarming rate, it became imperative that the public be warned of the dangers of illicit brew that was in circulation in the market. This was to be possible only by involving print media, electronic media, social media, TV and FM radio stations. The Respondent then engaged the TV stations and print media.

14. The Claimant stated that, the Board holding that there had been procurement mal-practices, recommended that the Respondent invites the Procurement Oversight Authority to be called upon to investigate on the same. He had to write an invitation letter to the Authority, in his capacity as the Acting CEO. The Authority upon conclusion of the investigations, did a report and forwarded the same to the EACC. This eventually led to the arrest, and arraignment in Court of the Chief Officer and the Tender Committee members. The substantive CEO, held and always did, that the Claimant was the cause of his woes.

15. The Claimant contended that in an effort to have the members of the public fully sensitized, he undertook several actions, actions which were in collaboration with the Board led by the Chairman. In the course, Kenya Broadcasting Corporation, was identified as the station with a large country wide reach. Besides, during that time it was airing World Cup Soccer games, an additional assurance that through it a larger audience would be reached.

16. He stated that by reason of the premises, the Chairman of the Respondent approached and requested KBC to air the Respondent's messages at their prime time, when they were airing the World Cup Matches, and also put the massages through its local FM radio stations, so that a majority of Kenyans would be reached, with an aim of reducing the deaths.

17. It was contended that the interventions bore fruits, the number of deaths that would be attributed to consumption of illicit brew declined, because the source of the brew had been identified, and the flow of the same therefrom stopped.

18. The Claimant stated that the Chief Officer's suspension was lifted on the 25th June 2014, at night, and the following day, he reported back to work. Subsequently, the Claimant handed over the office back to him.

19. The CEO started accusing the Claimant of mal-procuring of media services worthy Kshs. 67,339.99, and this formed the subject matter of the show cause notice dated 24th October 2014. The Claimant contended that the notice suffered from lack of particulars on the charges sufficient enough to enable him respond. This notwithstanding, the CEO demanded for the response within a very short time.

20. He asserted that he gave a detailed response to the accusation, raising a good defence, denying the charges and bringing it to bare that the accusations were malicious, false and vexatious. He demanded for an impartial investigation into the matter.

21. He stated that on the 14th July 2015, the Respondent through its Board conducted an unlawful, un-procedural, biased, and partial disciplinary hearing against him. The Board resolved to have him interdicted. The decision was expressed through a letter dated 28th October 2015. It cited charges that were vague and abstract, deficient of details.

22. The Claimant stated that later on the substantive Board Chairman reversed the decision of interdiction, and this was communicated through a letter dated 10th December 2015, by the CEO. Notwithstanding this, the CEO ordered that the Claimant's office be locked, making it impossible for him to access the same. This prompted him to complain to the Chairman through a letter dated, 14th December 2015. He had to proceed for the interdiction upon the reason that there was immense infighting within the Respondent institution.

23. The Claimant stated that the interdiction was scheduled to last for six months. However, as at the 20th April 2016, no determination had been made on the fate of his employment, yet it was only 24 days to the lapse of the six months. This pushed him to commence judicial review proceedings, vide Judicial Review Application No. 2 of 2016, against the Respondent. The Court eventually rendered itself on the matter, directing the Respondent to conclude the disciplinary process within 24 days. The Court however stated that its decision would not be an impediment to the Claimant's challenge of any decision that was to be arrived by the Respondent.

24. The Claimant asserted that on the 1st November 2017, the Respondent purportedly constituted a disciplinary committee, and a decision made that his employment be terminated.

25. Being aggrieved by the decision, the Claimant appealed against the same, however the Respondent refused to hear the same for the reason that he had already left the institution and therefore not eligible to lodge an appeal. This was contrary to the Respondent's Employment Manual and the Judicial Review Judgement.

26. The Claimant asserted that the Respondent did call upon other Government agencies to investigate the matters, and all those agencies didn't find him culpable in any manner. The termination was therefore without any evidence or valid reason.

27. As regards the procurement that was the subject matter of the disciplinary process against him, the Respondent discriminatorily singled him out of three officers who were subject to the transaction. The others escaped termination of their contracts of employment with warnings.

28. The Public Procurement and Oversight Authority never carried out any independent investigations, consequently, it was inappropriate for the Respondent to use its findings to terminate his employment. The Respondent's document no. 8, the Response from PPO on media procurement, was express that their opinion was not as a result of any independent investigation.

29. The Kenya Broadcasting Corporation, had lodged a dispute against the Respondent for breach of contract with an Arbitrator. The Arbitrator returned a verdict against the Respondent, finding that

the procurement was in accordance with the law, and that the Respondent was liable to pay it, Kshs. 8,958,056.70. The Respondent exhibited resistance against settling the Claim, until the Attorney General had to direct that they so do.

30. He asserted that the transaction that led to his termination, procurement of media services, was a transaction between Government Departments and therefore was not subject to the *procurement Act*. In support of this, the Claimant testified that the letter dated 30th November, 2015, in response to the Respondent's Chairman's letter dated 2nd November 2015, the Public procurement Oversight Authority advised that the provisions of the Act were not applicable in procurements as between Government departments.

31. The Claimant asserted that all the intervention strategies and or actions that he did put in place was with the knowledge and approval of the Respondent's Board. The Claimant referred the Court to the minutes on a management consultative meeting on alcohol related deaths, of 12th May 2014, whereat the Respondent's staff under his leadership, was checked on the progress in the fight against the crisis. He further referred the Court to the minutes of the special Board meeting, of 3rd June 2014, the meeting was called for the management to brief the Board on how the fight against consumption of illicit brew had been approached. In the meeting, the media strategy was discussed, and the cost implication. As at that time, the Respondent had incurred Kshs. 27,937,825 on media advertisement, the Board approved the expenditure.

32. The Claimant further referred to the Report [document No. 10], that was out of the meeting he had with his staff, in attendance of the Chairman. The report was for submission to the ministry, on how the Respondent had so far managed the crisis.

33. To demonstrate further that the procurement was above Board, the Claimant referred the Court to various emails between him, the members of staff of the Respondent, and the Board. He emphasized on the email correspondence to the Board, to which a proposal to procure the services of KBC, was attached. At the time, there was money to meet the expenditure.

34. On the Respondent's document dated 3rd April 2018, under cover of which a circular [document No.2] was sent to various entities, the Claimant testified that the circular didn't apply to expenditure by NACADA as it was not fully funded by the exchequer.

35. The notice to show cause, the disciplinary proceedings, termination process, were unlawful, unfair and violated the provisions of the *Employment Act*, *the Constitution* of Kenya 2010 and the rules of natural justice.

36. He alleged that according to the Respondent's manual, disciplinary proceedings are supposed to be concluded within 6 months, but in his case, they took one and half years. In the Judicial Review Application Judgement, the Court gave 24 days within which the disciplinary proceedings were to be concluded, but the Respondent didn't adhere to the direction. There weren't any investigations carried out after the Judgment.

37. Cross examined by Mr. Odukenya, Counsel for the Respondent, the Claimant stated that the advisory by the Public Procurement Authority, on the letter dated 30th November,2015, did not fully exclude him from being subject to the provisions of the Act. Paragraph 4 of the letter required him to apply conventional methods which he did. The advisory required that the procuring entity be guided by the value for the money.

38. The Claimant contended that the procurement for the media services was an emergency procurement, owing to the fact that the death toll kept going up daily. The media services were procured from 12th

May to 25th June 2014. The 1st deaths were recorded on the 8th may 2014. From 8th -30th May, 2014, there were 124 deaths.

39. The letter by the Respondent's Advocate [page 347, Claimant's documents] conveyed the Judgement of the Court in the Judicial Review Application, to the Respondent. The Respondent didn't comply with the timelines that were set in the Judgement. It didn't render a decision within 24 days. According to the Claimant, he was dismissed on 1st November 2016, twenty-five days of the date of the judgment.

40. The Claimant further stated that there was no obligation that was imposed on him to consult other Government Agencies before procurement. In procuring the media services, he followed the law.

41. The Claimant stated that he was served with a notice to show cause, to which he Responded on the 31st October, 2021. In the response, he indicated that the commenced process was a witch hunt. He never appeared before a disciplinary committee. He moved to Court to challenge the process through the judicial review application. The Court rendered itself and directed that the disciplinary process proceeds to completion.

42. The decision to interdict him was by the Board, the Chairman rescinded the decision. He asserted that the Chairman had the powers to so do.

43. The notice to show cause was clear on the accusations that were against him. The Claimant contended further that the award against the Respondent by the arbitrator, and the letter by the Attorney General advising the Respondent to settle the award vindicated him.

44. Cross examined on the claim for compensation for the remainder of the contract period, the Claimant admitted that the same was not anchored on his employment contract.

45. He asserted that the claim for damages for defamation, was grounded on the various letters that were written to people and other agencies by the Respondent of him. Owing to the manner his employment was terminated, he has not been able to get an employment elsewhere, despite several application in seeking.

46. In his evidence under re-examination, the Claimant stated that the procurement for the KBC media services was done during a time of a crisis, immediate efforts had to be made to contain the crisis.

47. The letter by the Chairman, copied to various ministries on the containment measures and the amount of Kshs. Twenty-Five million that was spent in regard thereof, was clear testimony that the procurement was procedurally done. The award by the arbitrator, went beyond the sum of Twenty-Five Million because of the interest earned aspect.

48. He asserted that though the Court in the judicial review application matter directed that investigations be conducted before any disciplinary action they weren't done.

The Respondent's Case

49. The Respondent presented two witnesses to testify in support of its case. Joyce Atema Lisanza, its Manager Human Resource Administration, who testified as its first witness. The Witness [Rw1] urged Court to adopt her witness statement herein filed dated 9th May 2018, as her evidence in chief, and the documents that the Respondent filed, as its documentary evidence. The documents were produced as exhibits 1-9.

50. The witness testified that the Claimant was issued with a notice to show cause on a charge of un-procedural procurement, *inter alia*. The procurement process, is commenced by a requisition from the user department then the requisition has to be approved by the CEO, and thereafter the Finance

Department has to endorse availability of funds. As regards the procurement of media services, the user department was the Communications department.

51. The witness testifying on the letter dated 20th December 2013, by the Ministry of Interior and Co-ordination of National Government, stated that the same forwarded a circular on austerity measures on commitment and expenditure, to various Government Agencies. The circular was forwarded to the Respondent on the 23rd December 2013. As at the Month of May 2014, the circular was in force.

52. The witness testified that under cover of a letter dated 15th May 2014, the ministry released another circular number 6/2014, on control of commitment control during the close of the financial year 2013/2014. According to the witness, the Ministry was instructing the Accounting Officers not to make any new commitments.

53. The witness testified that through a letter dated 7th November 2014, the Claimant sought approval from the Ministry for payment of the then outstanding media bills arising from advertisements in the media between 16th and 30th June 2014. The Principal Secretary- Interior declined to make the approval, on the ground that the Ministry guidance on the matter which had been communicated through a circular O.P.PA/2/27A of 14th February 2014, was not adhered to. This was communicated through her letter dated 25th February, 2015. Besides, the Principal Secretary advised that disciplinary action be taken against the officers who breached the law. The Respondent was advised to seek advice from the Attorney General and the Principal Secretary Treasury.

54. The witness stated that, through a letter dated 27th October,2015, addressed to the then Respondent's CEO, the Director General advised that the procurement was not carried out in accordance with the procurement Regulations. The office of the Attorney General, on its part, through a letter dated 29th April 2015, directed the Respondent to engage the Public Procurement Authority to investigate the matter.

55. The witness testified that the Authority carried out investigations, and concluded that there were anomalies in the procurement, and recommended that action be taken against the responsible officers. The witness stated that the advisory was binding on the Respondent.

56. The witness asserted that the Respondent complied duly with the Judgment in the Judicial Review Application. That a Special Board meeting was held on the 31st October 2016, where a decision was made to terminate the employment of the Claimant. The decision was communicated to the Claimant on the 1st of November 2016. However, the Respondent didn't not place the minutes of the meeting before the Court.

57. The witness asserted that the termination was in accordance with the procedure provided for in the Human Resource manual, and the *Employment Act*.

58. Cross examined by Ms. Mumbo for the Claimant, the witness stated that she joined the service of the Respondent in the June 2017. Investigations were done. The Investigation Report by PPOA, did not mention the name of the Claimant. None of the documents tendered by the Respondent on mal-procurement mentioned the Claimant.

59. Her testimony on the termination was upon basis of the record held by the Respondent.

60. The witness admitted that the letter dated 8th October 2015, addressed to the Director General Public Procurement Oversight Authority, was done by the Chairman who was the immediate supervisor of the Claimant. No action was ever taken against the Chairman on the letter, if at it wasn't warranted.

61. She contended that the expenditure was not budgeted for. The Respondent was being committed to an expenditure it wouldn't pay.

62. The Claimant admitted that in her witness statement she alleged that the Board sat and decided to allow the Claimant to appear before the Staff Welfare Committee. The Respondent did not place any minutes of the committee proceedings. She wouldn't know when the meeting was held. There is nothing to show that the meeting ever took place.

63. According to Section 9.14.6.4 of the Human Resource Manual, suspension or interdiction has to be preceded by investigations. Against the Claimant as a person, the Respondent didn't conduct any investigations.

64. The Manual at its section 9.14.4.1 provides for a final warning, the Claimant was issued with none, or any warning or at all. The Manual provided for the disciplinary process at section 9.10.1. The section inter alia makes a report by the Staff Advisory Committee a requirement before any disciplinary action is taken against an employee. There is no such a report, tendered before the Court.

65. The witness stated that the decision to terminate the employment of the Claimant was made by a sub-committee [Board Staff Welfare Committee] The Committee prepares a report which it transmits to the full Board for consideration and adoption. However, the Board is not bound by the report. There is not such report produced before the Court.

66. The witness stated that she did not have any record to demonstrate that such a report was placed before the Full Board for consideration.

67. The witness testified that the procurement for KBC services was a direct procurement. Her not being a procurement expert wouldn't be able to testify as to when direct procurement was permissible. She wasn't aware whether direct procurement would be done by the Respondent.

68. The witness testified that the Respondent had two sources of funds, and each of them had different guidelines on utilization of funds flowing therefrom. The circular that was released under cover of the letter dated 13th May 2014, only related to funds from the exchequer. One of the reasons why the Principal Secretary -National Treasury declined to make a post -procurement approval was as expressed in his letter dated 2nd March 2015 that the Respondent had sufficient funds to underwrite the then pending bills.

69. She stated further that she was aware that action was taken against the CEO, Wills and other employees. The action that was taken against the CEO, and the others was not in respect of the procurement of media services.

70. She contended further that the Claimant was invited to appear before the Staff Welfare Committee, and that he did on the 18th June 2015. The Witness asserted that in the Judicial Review Judgement, it was expressed that the Claimant was not able to establish that there was a derogation from the principles of natural justice. At paragraph 40 of the Judgment, the Court indicated that the Respondent had less than 24 days to complete the pending disciplinary process.

71. Upon this Court seeking clarification from this witness, she stated that paragraph 39, of the Judgement indicated that investigations into the alleged mal-procurement were pending. The investigations had not been completed. She further stated that after the Judgement, investigations were done by PPOA. However, she changed and stated that the investigations by the Authority [PPOA] were before the Judgement. The Respondent had nothing to show that investigations were conducted after the Judgement.

72. The witness stated that the import of paragraph 40 of the Judgment was that there were disciplinary processes that were pending and that were to be continued with after the Judgment, she confirmed that the subject matter of the Judicial Review Application was the interdiction, not the termination.

73. The Respondent's second witness was Julius Ayub Gethire [RW2]. The witness urged the Court to adopt his witness statement dated 9th May 2018 as part of his evidence in Chief. He stated that he was a former Chairman of the Board of Directors of the Respondent. He had served the Respondent in the capacity pursuant to an appointment in his favour that came in, in the year 2016. As at the time he was making the statement he was still serving.

74. The witness confirmed that the Claimant was appointed to act as the Respondent's Chief Executive Officer following the interdiction of the substantive Chief Executive Officer [by the Cabinet Secretary, Ministry of Interior, and Coordination, of National Government on the 8th of May 2014 following the deaths of over 80 Kenyans].

75. The witness alleged that it was during the headship of the Claimant that the Respondent incurred bills amounting to Kshs. 67,339,188.99 resulting from procurement of media services from various providers.

76. He stated further that the unprocedural procurements were done: without a formal request from the user department as was required by the Public Procurement and Disposal Regulations, 2006; without prior approval of the Board; without the involvement of Tender Committee and were done contrary to Circular No. OP.PA/2/27A of 14th February 2014 which required that all media requirements of Government Institutions be approved by the relevant Cabinet Secretary.

77. It was stated further that the media services procurements were done at a time when Treasury circular [6/2914] of 13th may 2014 had directed that Accounting Officers should not get into new commitments between 15th May and 30th June 2014 unless with written authority from the Principal Secretary National Treasury.

78. That in his position as Acting CEO, the Claimant was expected to ensure that all engagements of and by the Authority including procurement procedures were undertaken with outmost care and caution, adhering to the relevant Government Circulars, Laws and Regulations as well as the Authority's Human Resources Procedure Manual to ensure the integrity of the Respondent was maintained.

79. The witness further stated that the Respondent's Management did engage and consult with relevant agencies including its parent ministry, The National Treasury, the Public Procurement Oversight Authority and the Office of the Attorney General on how best to resolve the matter of the pending bills since the payments had not been finalized by the close of the financial year 2013/14 and as such the service providers were claiming from the Respondent.

80. The Respondent's management got advised by the relevant agencies including its Parent Ministry, The National Treasury, the Public Procurement Oversight Authority and the Office of the Attorney General to act against those involved in the un-procedural procurements. This led to the issuance of the show cause letters dated 24th October 2014 to the Claimant together with two members of staff who were involved with the procurement.

81. The Notice to Show Cause issued to the Claimant together with the two other members of staff, was properly issued pursuant to clause 9.10.2 of NACADA Human Resource policy which notice the Claimant elaborately responded to by a letter dated 3rd October 2014.

82. That the Respondent was dissatisfied with the explanation made by the applicant and they invited him, by a letter dated 27th March 2015, to appear before the staff and welfare Board committee, a sub-committee of the Board of directors which has the legal mandate to hear disciplinary cases in respect of employees.

83. He stated further that the notice to appear before the committee dated 27th March 2015 was timeously received by the Claimant who appeared before the committee on 18th June 2015, about three months after the notice to attend the hearing was received.

84. Following the appearance by the Claimant before the staff and welfare Board committee and subsequent sittings of the Board of Directors, a decision was reached to interdict the Claimant with immediate effect as the Authority awaited finalization of the matter by the relevant authorities. The interdiction was effected vide a letter dated 28th October 2015.

85. The Claimant moved to Court vide JR No 2 of 2016 seeking orders of certiorari to quash the decision of the Respondent to interdict him and mandamus to compel NACADA to reinstate him to his position. The application by the Claimant stayed the decision of the Respondent which saw the Respondent resume duty at the Authority.

86. The Court while dismissing the Judicial Review Application as having no merit that the Respondent did not violate the cardinal rules of natural justice and that the Respondent had that far acted in keeping with the law and its Human Resources Policy. Further the judgment noted that the injunction granted on 4th April 2016 pre-empted further action by the Respondents [NACADA, CEO and AG]. Consequently, the Claimant was required to proceed on the remainder of his interdiction which was less than 24 days within which the pending disciplinary process was to be concluded.

87. The witness stated that the Claimant was taken through the disciplinary proceedings in conformity with the Respondent's Human Resource Policy and the rules of natural justice.

88. He asserted that the decision of the Board during its special sitting of 31st October 2016 to terminate the contract of service of the Claimant was on account of his negligence and omission to carry out his duties diligently while he was Acting CEO contrary to Clause 9.6 [iii] of the Authority's Human Resources & Procedural Manual, resulting to a gross misconduct on his part.

89. The witness confirmed that the Claimant appealed against the termination, but the appeal was not considered for the reason that since he had cleared with the Respondent, the Human Resource Manual didn't apply to him.

90. Referred to the minutes of the Board meeting of 31st June 2014, by Counsel for the Claimant under cross examination, the witness confirmed that the agenda for that meeting was providing an update on the alcoholic crisis. The witness acknowledged that a report was tendered by the management on actions that had been undertaken to contain the crisis. Further that during that time there were public awareness campaigns, conducted.

91. The witness confirmed that the documents tendered by the Claimant indicated that there was a documentary that was run by various stations KBC, inclusive.

92. The witness confirmed that from the minutes of the special Board meeting of 3rd June 2014, a report was made to the Board on the cost of the response to the crisis, and for Media Advertisements, Kshs. 25,260.878.00 had been incurred. The management recommended that public awareness programmes be continued with.

93. The witness acknowledged that special meetings are carried out if there is a crisis to be addressed. That in the meeting only two members of the Board were absent. Then the witness wasn't the Chairman of the Board. In the meeting, there was no accusation raised against Claimant that he was acting unilaterally in any respect.

94. The witness further stated that the Respondent's legal officer was involved in processing of the contract between the Respondent and KBC. The Arbitrator found that the procurement of KBC services was properly done. As the witness was then not in the service of the Respondent, he was not in a position to tell whether there was any action taken against the officers from the legal department.

95. The legal officer admitted that she didn't give proper advice to the Acting CEO [Claimant]. She only got a reprimand. She was given a more lenient sanction than the Claimant.

96. The witness acknowledged the fact that the *Public Procurement and Disposal Act*, provides for various modes of procurement. He wouldn't tell when open tendering would be engaged under the Act.

97. The Claimant was appointed to position of Acting CEO, when thigs were not normal in the, Country and the Respondent Organization.

98. Referred to the circular dated 13th May 2014, the witness stated that the same wasn't clear as to who it applied to. It didn't prohibit entering into new contracts during the period.

99. At appoint to the acting position, the Claimant was mandated to act in consultation, to ensure that normalcy was recorded, in regard to matters alcohol in the Country.

100. The witness confirmed that in his statement turned evidence in chief, he stated the letters from, the Ministry of Interior, dated 25.02.2015, National treasury, dated 2.03. 2015, the office of the Attorney General, dated 29.04.015, and PPOA, dated 27.10.2015, formed the basis for the notice to show cause, however, it is clear that the notice to show cause is dated 24.10.2014.

101. The witness stated that he was not conversant of the role that PPOA, would play in a matter where mal-procurement is alleged.

102. The Disciplinary Committee did its investigations on the KBC contract. Further that the Attorney General advised that the matter be referred to PPOA for investigations. However, he wouldn't tell whether the investigations were carried out.

103. Though the minutes relating to the termination of the Claimant's employment indicate that the substantive Chairman was present, the minutes are not signed by him as required. They were signed by the Vice- Chair.

104. The witness stated that there was a meeting that was held on the 31st October 2016 after the Judgment in the Judicial Review matter, however, he was not sure whether or not the Claimant was invited to attend.

The Claimant's Submissions

105. The Claimant's written submissions hugely restates the evidence that was given by the parties herein, a practice that this Court does not appreciate. It unnecessarily burdens the Court. That be as it may, I now turn to consider the submissions.

106. The Claimant's Counsel identified two issues for determination in this matter, thus;

i. Whether the Respondent was justified in terminating the Claimant's contract of employment in which case, it is incumbent upon the Claimant to prove substantive impropriety on the part of the Respondent.

ii. Whether the Respondent followed the procedure that is set out in the Respondent's HR. Manual and the Law in terminating the Claimant's contract of service.

107. On the 1st issue Counsel submitted that according to the Claimant's letter of appointment, he was supposed to serve for a term of 5 years, a term which was renewable upon good performance. The Claimant was entitled to a service gratuity at the rate of 31% of his basic salary upon completion of the term. Contrary to his legitimate expectation the contract of service was terminated before effluxion of time.

108. The Claimant's counsel argued that, the Judgment in the Judicial Review Application No. 2 of 2016, at paragraph 39, contemplated that post the judgment, the Respondent was to carry out investigations to establish culpability of the Claimant in the alleged mal-procurement. That instead of carrying out the investigations, the Respondent decided to write numerous letters to the various Government agencies, and holding Board room meetings. This did not amount to investigations.

109. Counsel submitted that on the 10th October, 2016, the Claimant's Counsel wrote a letter to the Respondent reminding them of the need to comply with the directions that were given by the Court in the above-mentioned Judgment. With a warning that a default would have legal consequences.

110. The letter was received on the 1st day of November, 2016, the Respondent subsequent to the letter on the same day issued the Claimant with a termination letter, purporting that a decision to terminate him, had been made on the 31st October 2016.

111. The Respondent never carried out any internal investigations in order to establish whether the allegations that had been levelled against the Claimant were true in order to justify the termination. Section 9.10 of the Respondent's Human Resource Policies and Procedure Manual require the Respondent to set up staff Disciplinary Advisory Committee to handle and determine all disciplinary matters, after which the supervisor is required to issue a show cause letter to the employee. There was no evidence that this procedure was adhered to by the Respondent.

112. The termination letter indicated that the same was anchored on the provisions of section 9.1.14.1 of the Manual, a section which provided:

> "..... If the employee's behaviour does not meet the required standard by the end of the period given in the Final warning, the authority shall terminate the employees' services. The appropriate notice period or payment in lieu of notice shall be given ....."

There was no warning that was issued to the Claimant at any time.

113. Counsel submitted that the section further provides detailed steps that must be followed in disciplinary matters against the Respondent's employees, prior to a decision to terminate the employee's employment or summarily dismiss him. The Respondent did follow this elaborate mechanism.

114. It was further argued that it was the Respondent's case that their decision was based on the letters by the various Government Agencies. However, looking at the various letters by the Agencies, are not specific on the procurement that was not properly done, considering that there were several media services that we procured by the Respondent besides the KBC services. The letters do not mention KBC services specifically.

115. It was further contended in paragraph 6 of the 2nd Respondent's witness's statement dated 9th May, 2018, he stated:

> " ..... that the advice that the authority's management received from the relevant agencies including its parent ministry, the National Treasury, the Public Procurement Oversight Authority and the office of the Attorney General to take action against those involved in the un-procedural procurements is what led to the issuance of the show cause letter dated 24th October 2014 to the Claimant with two members of staff who were involved with the procurement of media services."

This is misleading according to counsel. All the letters were issued in the year 2015, long after the show cause notice had been issued.

116. Even if the agencies advised that action be taken against the officers that were allegedly involved in the alleged mal-practice, the Respondent was still bound to adhere to the stipulations of section 10 of the manual, carry out and or conclude investigations in accord thereto.

117. The Claimant was interdicted with immediate effect pending further investigations by relevant authorities, following a decision that was purportedly made during a Board meeting that was held on the 9th June 2015, and 7th July 2015, it is argued that therefore the disciplinary action was commenced against the Claimant on mere allegations before they would be conclusively proved by the various agencies. The termination was on account of unconcluded investigations.

118. Section 8 of the Public Procurement and Disposal Act, 2005 establishes the Public Procurement and Oversight Authority is mandated under section 9 to ensure that the procurement procedures established under the Act are complied with. Section 102 of the said Act gives the Director General of the Authority [PPOA] to order an investigation of procurement proceedings in order to determine whether the provisions of the Act have been breached.

119. It was further stated that section 105 of the said Act specifies the action that may be taken by the Director General upon completion of the investigations.

120. In the submissions, counsel referred to paragraph 27 of the Judgment in the Judicial Review Application, thus:

> " 27 ..... The Authority took into consideration the Applicant's oral and written Defence in its decision to interdict him pending further investigations and from the Independent Procurement Oversight Authority ....."

And argued that the Authority was not enabled to carry out meaningful investigations as the Respondent supplied it with insufficient documents.

121. It was argued that at all material times, as is evidenced by several documents, the Claimant carried out his duties as the Acting CEO, and kept the Respondent abreast of every action and event. The documents are testament that the Board meetings that were held, were informed and/or given an update of all the actions/or mechanisms that had been put in place to monitor and manage the Alcoholic crisis in the country, and all the decisions in regard thereto were made collectively.

122. It was agreed that the Claimant had an impressive work record, it is only the substantive CEO who was not happy with him, and this owing to the mal-practices that the Claimant brought to bear, that implicated the substantive CEO and the other officers, leading to action being taken against them.

123. The Claimant's counsel stated that the KBC contract had been reviewed and witnessed by the Respondent's Legal manager before being forwarded to the Claimant who was the Acting CEO at the time, and thereafter forwarded to KBC. The Legal Department was fully involved.

124. Counsel submitted that in the show cause letter, the Claimant was never accused of breaching Treasury circular No. 17/2013 dated 17th December, 2013, [the Respondent's exhibited No. 2].

Imperative to note that the Respondent did not tender Treasury circular No. OP.PA/2/27A of 14th February, 2014, so that it is impossible for Court to take it into consideration.

Counsel submitted that section 5 of the *Alcoholic Drinks Control Act* [No. 4 of 2010] and section 6 thereof, provides for internal funding and supervision and administration of the funds. It is clear from the stipulations of section 6 that the Claimant who was the accounting officer at that time, was empowered by the Act to manage the funds that were collected internally and make appropriations in order to cater for emerging needs. The alleged circulars were only applicable to exchequer funds.

125. It was argued that there is ample evidence on record to support the Claimant's case that the procurement of the KBC Services was an emergency Procurement and as such, it was exempted from the strict tendering procedures or other procurement methods. Section 3 of the *Public Procurement and Disposal Act* No. 3 of 2005, and Public Procurement and Disposal General Manual Provisions, were cited.

126. That the evidence on record supports the Claimant's position, the Court was asked to consider the letter dated 8th October, 2015 that was written by the then Chairman of the Respondent to the Director General of the Public procurement and Oversight Authority; and the evidence of the Respondent's witness [RW2] who confirmed under cross examination, that at the time the Claimant was being appointed, the situation both in the country and the Authority was not normal.

127. Counsel further submitted that the letter dated 30th November 2015 by the Director General, Public Procurement and Oversight Authority to the Chairman of the Respondent, [Hon. John N. N. Mututho], addressed that section 4 [2] [e] of the Act, provided that the acquisition of services by a procuring entity provided by the Government or a Department of the Government is not procurement. The application of the *Procurement Act* was therefore excluded in the circumstances of the matter.

128. The allegation that the procurement was done long after the deaths had stopped, is a bare assertion. The Claimant's exhibit 34 adequately discounts this evidence.

129. On the 2nd issue, counsel submitted that the termination letter did not express to the Claimant that he had a right of appeal to challenge the decision. Nevertheless, the Claimant exercised his right of appeal pursuant to the stipulations of the Human Resource Manual, section 9.19.14. The Respondent failed to hear the appeal within the stipulated time, or at all and in fact in its letter dated 16th December 2016 declared that he had no right of appeal, as the Human Resource Manual no longer applied to him as he had already cleared with the Respondent.

130. There was no evidence as to when exactly the Claimant cleared from the Respondent Authority, and any section of the manual upon which the decision was arrived at.

131. Counsel submitted that section 41 of the *Employment Act* provides for notification and hearing before termination on the ground of misconduct. Section 9.14 of the Respondent's Human Resource Manual provided for in a detailed Disciplinary Procedure, a disciplinary procedure. Both the provisions of the Act and the Manual regarding Procedure, where not adhered to.

132. The Respondent alleged that the decision to terminate the Claimant's contract of employment was allegedly made by the Board on 31st October, 2016. The minutes of the meeting were never tendered as evidence, so that one is able to gauge whether or not the procedure was adhered to. That in fact the Respondent admitted that the Claimant was not given audience at the time the decision was being made.

133. It was contended that, after the Judicial Review Judgment there were no further investigations, or disciplinary proceedings.

134. Further that though the Respondent's witnesses alleged that the Claimant was interdicted pending further investigations by the Board pursuant to its meeting of 7th July 2015, and 12th October 2015, the Respondent did supply Court with the minutes of the alleged meeting of 12th October, 2015. It is suspicious that though the minutes for 7th July 2015 meeting indicate that the Chairman was present, the minutes are not signed by the Chairman contrary to the expectations of the schedule [section 7] of the *NACADA Act*, on the conduct of business and affairs of the Board. The tone of the letter by the Chairman to the substantive CEO dated 27th October, 2015 and that of the Claimant dated 10th December, 2015, is express, the Chairman was not aware of the happenings.

135. It is not difficult to conclude that the process leading to the termination of the Claimant's employment wasn't justified, it was tainted by malice. The Claimant was condemned unheard, and his fundamental rights under Article 41 [1], 47 [1] and 50 [1] of the Constitution were violated. The particulars of malice pleaded in his memorandum of claim were proved.

136. The Claimant duly discharged his burden of prove under section 47 [5] of the *Employment Act* as well as section 107 of the *Evidence Act*.

137. To buttress her submissions on the two issues, Counsel placed reliance on the following authorities, thus;

138. Cause No. 435 of 2013, In The Industrial Court of Kenya at Nairobi *Nery Chemweno Kiptui -vs- Kenya Pipeline Co. Ltd*.

Where it was stated as follows: -

> " 34. Invariably therefore, before an employer can exercise their right to terminate the contract of an employee, there must be valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity. Once this is established the employee must be issued with a notice, given a chance to be heard and then a sanction decided by the Respondent based on the representation made by the affected employee. It is now established best practice to allow for an appeal to such an employee within the internal disputes resolution mechanism and with due application of the provisions of section 5(7) (c) of the *Employment Act*. Where this procedure is followed an employer would have addressed the procedural requirements outlined under section 41 and any challenge that an employee may have would be with regard to substantive issues only."

139. Cause No.1726 of 2017, In the Employment and Labour Relations Court of Kenya At Nairobi Eng. *Stephen Mbugua Chege -vs- Nairobi City Water & Sewerage Co.*

Where it was stated as follows:

> — 51. In any event, where an employer bases the termination of employment on work performance, even where the right to terminate an employment contract exists as a term and condition of employment, the statutory protection given to an employee to prevent

a case of malice, bad faith and malpractice is section 41 of the *Employment Act*, 2007. The procedures envisaged in the law are mandatory. Such cannot be made optional by an employer seeking to end an employment contract on the simple basis that the contract of service has a clause on termination. Such termination must have a basis. To allow a termination clause to override the clear provisions of the law would end up negating the very essence of article 41 of *the constitution* on the right to fair labour practices. With regard to the Respondent, any termination of employment without taking into account the HR policy at clauses 8.4.2 as set out above would go contrary to practice, policy and laid down/ out procedures." [emphasis mine].

140. Cause No. 213 of 2015, In The Employment and Labour Relations Court at Kericho *Daniel Kiplagat Kipkeibut -vs- Smep Deposit Taking Microfinance Ltd*.

In this Case, it was stated as follows:

> — The Claimant further sought to rely on the authority of Nicholus Muasya Kyula v FarmChem Limited Industrial Cause Number 1992 of 2011; (2012) LLR 235 (ICK) where the Court held that;
>
> "It is not sufficient for the employer to make allegations of misconduct against the employee. The employer is required to have internal systems and processes of undertaking administrative investigations and verifying the occurrence of the misconduct before a decision to terminate is arrived at."

141. On the reliefs sought it was first submitted that the Claimant 's Claim for Defamation and Exemplary Damages is based on the averments contained in Paragraphs 14A, 14B, 14C, 14D, 20A, 20B, 20C and 20D of the Amended Memorandum of Claim, and anchored on the fact that the information that was published by the Respondent was absolutely not true. That following that, the Claimant has totally been unable to get another job, notwithstanding the many applications he has made, after the determination of his employment. His reputation was damaged following the actions of the Respondent. The Claimant has proved, that he is entitled to damages for the defamation. Reliance was placed on the decision in Cause No. 346 of 2014, In the Industrial Court At Mombasa- *Naqvi Syed Qmar -vs- Paramount Bank Ltd & The Attorney General*, where the Court rendered itself thus;

> " —36. Defamation: The report that the Claimant had been charged with theft was made in both the print and television media. This fact is not disputed. The Claimant states this seriously damaged his standing and association in the community. He no longer is able to walk freely into a bank here in Kenya. He had a banking career spanning 40 years. In Employment Law defamation takes place when the Employer publicizes or causes to be publicized, statements which stigmatize the Employee. The manner of dismissal and the negative publicity attached to the Claimant had the potential to damage his employability. Potential Employers in the industry in which the Claimant was a longtime servant, would find his attractiveness diminished. His stock in the market dipped. Employment related defamation is based on the old tort of defamation but given a new spin: the Employee's injured or damaged employability, and not merely the personal stigmatization, must be compensated. The Claimant was employed in Uganda after the theft incident. He explained he had interviewed for the job before the allegations in Kenya were leveled against him. The Claimant disclosed his problems in Kenya to the new Employer, who did not decline to employ the Claimant, the criminal case notwithstanding. This was perhaps a saving grace. It was not a sign that the

Claimant's employability was unaffected. It would still be difficult for the Claimant to find employment in the banking industry in Kenya granted the bad press he was subjected to through the actions of the 1st Respondent. The Claimant merits general damages for defamation occasioned to him by the Employer. He was clearly libeled and damned as a bank thief. Even after the charges were dropped, the 1st Respondent did nothing in making amends, and has instead opted to argue that investigations are still on, and the Claimant is still a suspect. General damages for defamation are merited. The Court assesses and grants these at Kshs. 2,500,000 again payable solely by the Employer."

142. On the damages sought for discrimination, it was submitted that the Claimant avers that he was singled out of three other employees who were involved in the KBC Media Contract which was the Subject matter of his termination. This was done despite the fact that the Respondent 's Legal Department had approved the Contract before it was acted upon. The as admitted by RW2, the other officers were just reprimanded, while the Claimant's employment was terminated.

Respondents' Submissions

143. Counsel for the Respondent suggested the following issues as those that emerge for determination in this matter, thus;

i. Whether the issue of procedural fairness is res judicata by dint of the judgment of Nderi J. in JR Application 2/2016: Enock Onchwari Nyakundi v NACADA & Another.

ii. Whether the Court is functus officio?

iii. Whether the reason(s) for the termination were valid/justified

iv. Whether the Claimant was defamed

v. Whether the petitioner is entitled to the reliefs sought.

144. On the first issue, Counsel submitted that it is not in dispute that the Claimant was given a show cause letter containing the charges and the particulars. It is also not in dispute that the Claimant responded to the show cause letter. The Claimant has not denied that he was invited for a hearing before the Staff and Welfare Committee of the Board through a letter dated 27th March, 2015. Further that there no dispute that the Claimant made an application to stop the disciplinary proceedings through JR Application No 2 of 2016: *Enock Nyakundi Onchwari v National Authority for the Campaign Against Alcohol and Drug Abuse & 2 others* [2016] eKLR-JR No 2 of 2016 wherein, it was held as follows:

> 31. The applicant was properly issued with a notice to show cause pursuant to clause 9.10.2 of NACADA Human Resource Policy. The applicant responded to the notice to show cause by a letter dated 31st October 2014 in which he gave written explanation as to why he was not guilty of alleged misconduct. The Respondents were dissatisfied with the explanation made by the applicant and they invited the applicant to appear before the staff and welfare Board committee, a sub-committee of the Board of directors which has the legal mandate to hear disciplinary cases in respect of employees of the 1st Respondent.
>
> 32. That the notice to appear before the committee is dated 27th March 2015 and was timeously received by the applicant. The applicant appeared before the committee on 18th June 2015, about three months after the notice

to attend the hearing was received by the applicant. The applicant has not produced any letters by himself requesting that he be provided with any particular documents to facilitate his defence. The applicant has not alleged or demonstrated that he was not prepared when he appeared before the committee on 18th June 2015. The applicant did not indicate that he requested to be given more time and or opportunity to supplement his defence.

"34. The applicant has not shown at all that the Respondents have derogated from the procedure. The applicant was notified of the serious charges laid against him and was asked to show cause why disciplinary action should not be taken against him. The Respondents gave him a full hearing before a duly authorised committee of the Board."

35. It is the Court' considered view and holding that the conduct by the Respondent did not violate the cardinal rule of natural justice articulated herein before in this judgement. It is also the Court' further finding that the Respondent has this far acted in keeping with the law and its Human Resource Policy. The applicant is under interdiction on half pay pending investigations of the case.

36. The interdiction took place by a letter dated 28th October 2015 which contain reasons for the interdiction. The suit was filed on 4th April 2016 before the expiry of the six (6) months period within which the Respondent is obligated to keep its employees on interdiction.

"38. The Court is satisfied that no excesses have been exhibited by the 1st and 2nd Respondents within the meaning of Nyongesa & 4 others -vs- Egerton University College supra. The Court is equally satisfied and in line with the decision in Daniel -vs- Duke of Norfolk (1949) I ALLER at 118 cited with approval in Peris Wambogo Nyaga -vs- Kenyatta University (2014) eKLR as follows;

> "There are in my view no words which are of uniform application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, rules under which the tribunal is acting and that whatever standard is adopted it is essential that the person concerned would have had a reasonable opportunity of presenting his case."

39. That the applicant has had a reasonable opportunity of presenting his case and he should not second guess the outcome of the pending investigations. In the circumstances of this case the remaining time of 6 (six) months period within which the interdiction will remain lawful will commence running again from the date of this judgement.

40. Accordingly, the Respondents have less than 24 days within which to conclude the pending disciplinary process failing which the applicant will have recourse in terms of clause 9.14 of the NACADA Human Resource Policy".

145A. After the judgement of 7th October, 2016, the Respondent concluded the disciplinary proceedings as directed by the Court and on 31st October, 2016, being the 24th day, the Board during its Special Meeting held on 31st October, 2021 resolved to terminate the Claimant's contract with the Respondent.

The Claimant did not demonstrate any fault on the part of the Respondent after the JR Judgment of 7th October, 2016 or at all. Therefore, the question/ issue as to procedure adopted by the Respondent in disciplining the Claimant was settled in the Judgment. This Court lacks jurisdiction to reopen that issue of procedure. The procedural propriety of the process is thus res judicata.

145. Reliance was placed on Mombasa HC Misc. Application No. 130 of 2011 wherein the High Court observed,

> " res judicata is a matter affecting the Jurisdiction of the Court, it is prudent that this be determined in limine before delving into the merits of the case, if Jurisdiction is established."

146. It was submitted that the Claimant having not assailed the decision by Justice Nduma in the Judicial Review Application, he cannot be heard to raise the issue of procedural fairness in this matter. On this, reliance was placed on the holding in *Mawathe Julius Musili v Irshadali Sumra & Others*, Petition No. 16 of 2018, where the Supreme Court held;

> " When no appeal is lodged against an interlocutory ruling by a trial Court, the issue in dispute is settled by judicial decision". See also Alba Petroleum Ltd v Total Marketing Kenya Ltd, Civil Appeal 43 of 2015."

147. It was further submitted that by reason of the submitted on issue of estoppel/res judicata herein above, this Court should make a finding that it is functus officio. On the principle of functus officio the Court of Appeal in *Telkom Kenya Limited vs. John Ochanda (suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR rendered itself thus;

> " Functus officio is an enduring principle of law that prevents the reopening of a matter before a Court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long as the latter part of the 19th Century. In the Canadian case of Chandler vs. Alberta Association of Architects [!989] 2 S.C.R 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860);
>
> "The general rule that a final decision of a Court cannot be reopened derives from the decision of the English Court of Appeal in re St. Nazaire Co. (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal Judgment had been drawn up, issued and entered, and was subject to two exceptions:
>
> 1. Where there had been a slip in drawing it up, and,
> 2. Where there was an error in expressing the manifest intention of the Court.

148. On the third issue, Counsel submitted on the approach that the Court should engage in considering whether or not there was a valid and justified reason for the termination and urged the Court to rely

on the holding of Lord Denning in the case of *British Leyland UK Ltd v. Swift* [1981] IRLR 91 stated as follows:

> " The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which an employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him"

149. It was submitted that the Claimant didn't prove that the termination was unfair. He didn't not therefore discharge the burden that was placed upon him by section 47[5] of the *Employment Act*. The Claimant's submissions have not touched on the real issues that led to the termination of his employment.

150. Section 45(2) of the *Employment Act* 2007 placed upon the Respondent a burden to prove that it had a valid and fair reason to terminate the Claimant's employment. The Respondent discharged burden. The reasons for termination were among others, negligence and omission, acting contrary to circulars at his disposal, acting contrary to section 8 and 10 of the Public Procurement and Disposal Regulations of 2006, breach of section 20(3) of the *Public Procurement and Disposal Regulations* breach of Article 226 (5) of *the Constitution* and section 197 (10 (h) of the *Public Finance Management Act*.

151. Urging this Court not to interfere with the Respondent's sanction against the Claimant, Counsel invited the Court to be persuaded by, and adopt the reasoning in, the South African case of *Nampak Corrugated Wadeville v Khoza* (JA14/98) [1998] ZALAC 24 thus:

> " A Court should, therefore not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the Court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable".

152. Counsel summed it up by stating that termination of the Claimant's employment was for a valid reason for which he was found guilty and the dismissal was the only remedy left to the Respondent. Other than blaming the substantive CEO at that time and producing reports and evidence that was not relevant to the Claimant's case, the Claimant failed to discharge the burden of prove through credible and admissible evidence to corroborate his allegations.

153. On the reliefs sought, the Respondent's Counsel argued that the claim for defamation was not established. He invited this Court to rely on *JMK & another v Standard Digital & another* [2020] eKLR where the Court held;

> " (29). In order to prove defamation, it must be shown that the words are defamatory, in that, they have a propensity to lower a person ' reputation in the eyes of right thinking persons. Or, that the words tend to cause the person to be rejected, disliked, ridiculed or avoided by people. In this regard, the words must be shown to have injured one's reputation, character or dignity."

(30) It must also be proved that the defamatory matter was published and that it referred to the Claimant. Publication is dissemination of the defamatory matter to 3rd parties. See Zamzam Hussein Aligele v Joseph Lekuton [2020] eKLR."

154. It was argued that the Claimant didn't plead with particular precision and did not establish facts to demonstrate that he was defamed or at all. He didn't bring forth any words in the letters written by the Respondent to other agencies that he considered defamatory and did not produce any evidence that the Respondent published any false information in the print media. Further that Claimant never called right thinking members of the society, as witnesses, lastly, he did not establish any malice in the alleged publication.

155. On reinstatement, it was submitted that reinstatement is not granted as of right but is a discretionary remedy granted only in deserving cases. In this case, the Claimant didn't establish that he merits the exercise of the discretion in his favour. To buttress this reliance was placed on the case of *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR.

156. On the Claimant's claim for compensation for the remainder of the contract period Counsel submitted that the relief isn't available to him, in support of this submission, he cited the decision in *Elizabeth Wakanyi Kibe v Telkom Kenya Ltd* [2014] eKLR, where the Court of Appeal stated;

> "Section 50 of the *Employment Act* provides that the Industrial Court in considering a claim for unfair termination shall be guided by the provisions of Section 49 of the *Employment Act*. Onyango, J. while considering the remedies available in a case of unfair dismissal correctly expressed himself in Engineer Francis N. Gachuri - vs- Energy Regulatory Commission- Industrial Cause No. 203 of 2011, as follows';
>
> "There is no provision for payment of damages to the date of retirement. This is because employment like any other contract provides for exit from the contract. The fact that the Claimant's contract was referred to as permanent and pensionable does not mean it could not be terminated and once terminated, he can only get damages for the unprocedural or lack of substantive reason for the termination. No employment is permanent. That is why the *Employment Act* does not mention the word 'permanent employment."

157. The Claimant's claim for a sum of Ksh 13, 072,012.16/= which is equivalent of the 4th and 5th year contractual period entitlements lacks any legal basis.

Analysis and Determination

158. From the pleadings, the evidence, and the submissions by the parties herein, I distil the following issues for determination;

(i) Whether on procedural fairness, this matter is res judicata the judgment in Judicial Review Application Number 2 of 2016.

(ii) Whether if the answer to [i] above is in the negative, the termination of the Claimant's employment was procedurally fair.

(iii) Whether the termination of the Claimant's employment was substantively fair.

(iv) Whether the Claimant is entitled to the reliefs sought or any of them.

(v) Who should bear the costs of this suit?

Of Res Judicata

159. Referring to the specific parts of the Judgment in the Judicial Review Application, the Respondent gained an impression and submitted that the Claimant's claim herein as regards procedural fairness, is res judicata the judgement. That consequently, the Claimant is estopped from raising the same again. The Court is *functus Officio*. From the onset, it should be pointed out and with due respect, that the point as raised by the Respondent is in ignorance, deliberate or otherwise, of the subject matter that were in the Application compared with the one that there is in the instant matter, the nature of the interdiction that were, and the extent of the realm of procedural fairness in matters disciplinary proceedings against an employee.

160. There is no disagreement between the rival parties herein that the Claimant was through a letter dated 28th October 2015 interdicted. And it is at this juncture that this Court must state that the interdiction was investigatory not a sanction, it is my view, that the view of the Respondent on this appears blurred, reason why it is raising the res judicata point. In the case of *Fredrick Saunda Amolo vs- Principal Namanga Mixed Day Secondary & 2 Others* [2014] eKLR the Court had an occasion to consider the interdiction question, thus;

> " It is important to note that there can be preventive interdicts or punitive interdicts. On one the part being an interdict that is done in the context of allegations of misconduct prior to the finding of guilty and the other interdicts implement a sanction after the finding of guilty.
>
> Punitive interdict can only issue in the circumstances where the employment contract, the code of conduct, the Collective Bargaining Agreement or Law allows for it as a sanction."

161. In this matter, the interdiction was not a punishment, but a step towards a likely sanction. The Respondent's witnesses in their evidence under cross examination, testified, and I agree that the interdiction against the Claimant was investigatory [paving way for investigations on the allegations]. This much the Judge in the Judicial Review Application, expressed, thus;

> 39. That the application has had a reasonable opportunity to presenting his case and he should not second guess the outcome of the pending investigations [emphasis mine]. In the circumstances of this case the remaining time of 6[six] months period within which the interdiction will remain lawful will commence running again from the date of this Judgment."

162. The Respondent's Human Recourses Policies and Procedures Manual, at Section 9.14.1, and the Honorable Judge placed reliance on it in the Judicial Review Application Judgement, only envisages an investigatory interdiction. It provides;

> "9.14.1.1 Interdiction is a procedure applied on serious disciplinary cases that require investigations involving any breach of the Authority's policies in order to allow establishment of the facts of the case.
>
> 9.14.1.2 An employee who is on interdiction will be paid 50% of his basic salary less the statutory deductions. During this period the employee will continue earning applicable allowances in full.
>
> 9.14.1.3.....
>
> 9.14.1.4....."

163. Having found that the interdiction was investigatory, I have no difficulty in finding that post the Judgment hereinabove referred to, and completion of the investigations that were contemplated by the Respondent that formed the basis for the interdiction, further proceedings were expected whereby the Claimant would be heard on the accusations and the established facts or otherwise out of the investigations. Procedural fairness mandatorily had to be adhered to post the Judgement and the investigations. I agree with the persuasive view expressed by the High Court of Uganda in *Isabiye Charles vs Alex Kakoza, and 2 others*. Misc. Application Cause No.186 of 2020, thus;

> " ..... did the law and the prevailing interdiction norms expect/ mandate the Applicant to defend himself at the time when there was no substantially established case which can only be attained after investigations, to be defended against.
>
> I doubt that the law envisaged a hearing prior to the interdiction and this interpretation would defeat the whole purpose of an interdiction envisaged in the manual."

164. Looking at the material placed before me by the Claimant, he assails the termination of his employment on account of lack of procedural fairness in the process after the Judgment. The Court in the Judicial Review matter didn't look at this process, which at the time of its judgement had not been undertaken.

165. In *Lilian Muchungi v Green Belt Movement* [2022] eKLR, on the procedure relating to investigatory suspension this Court had an occasion to state the following;

> " My view on this point that investigatory suspension is an act that falls outside the ambit of section 41 of the *Employment Act*, it cannot aid a determination as to whether or not the procedure contemplated under the said Act was adhered to or not. However, if it is proved that a suspension of an employee was in breach of the terms of the contract of employment, or without reasonable and proper cause, a common law cause of action can be attracted in favour of the employee independent of, and sometimes preceding his termination. For instance, the employee can potentially seek to claim financial loss resulting from unfair and or procedural pre-dismissal treatment which encompasses suspension."

166. By parity of reasoning, I conclude that the procedural fairness that the Honourable Judge looked into in the judgment hereinabove stated was a procedure in regard to a cause of action independent of the one in the instant matter.

167. I find considerable difficulty to understand how the principle of res judicata can be said to be applicable here. I am not persuaded to sustain the argument that on procedural fairness aspect raised this matter is *res judicata*.

Whether the Termination of the Claimant's Employment was Procedurally Fair.

168. This Court has had an occasion to express itself before on procedural fairness thus, in a matter where an employee challenges procedural fairness in a process that led to termination of his employment or his dismissal, consideration should be given to the; employer's Human Resources Policies and Procedure Manual as the stipulations therein became terms of the contract of employment; mandatory provisions of section 41 of the *Employment Act*; provisions of the Fair Administration Actions Act; stipulations of Article 41 and 50 of *the Constitution* of Kenya,2010, and the Principles of Natural Justice, and the relevant International Labour Standards. As to whether there was procedural fairness in the process leading to the termination of the Claimant's employment, this Court shall engage these lenses.

169. In the Case of Eng. *Stephen Mbugua Chege- vs- Nairobi City Water & Sewerage* Co. Nairobi ERLC Cause No. 1726 of 2017, the Court expressed itself on procedural fairness, as follows;

> " 51. In any event, where an employer bases the termination of employment on work place performance, even where the right to terminate an employment contract exists as a term and condition of employment, the statutory protection given to an employee to prevent a case of malice, bad faith and malpractice is in section 41 of the *Employment Act*,2007. The procedures envisaged in the law are mandatory. Such cannot be made optional by an employer seeking to end an employment contract on the simple basis that the contract of service has a clause on the termination. Such termination must have a basis. To allow a termination clause to override the clear provisions of the law would end up negating the very essence of Article 41 of *the constitution* on the right to fair hearing. With regard to the Respondent, any termination of employment without taking into account the HR policy at clauses 8.4.2 as set out above would go contrary to practice, policy and the laid down /out procedure....."

170. Section 9.14 of the Human Resource Policies and Procedures Manual- 2012, elaborately, provided for the Disciplinary Procedure at its workplace, subsection [v] thereof provided;

> " In the event of a serious misconduct such as theft or use of violence in the workplace, the laid down steps in the disciplinary procedure under dismissal shall apply."

171. Section 19.14.6 provided for summary dismissal, and the steps that were to be followed leading to the decision as follows;

> " 9. 14.6.1 An employee may be dismissed from the services of the Authority where it is certified that the employee has breached rules and regulations governing his employment or the *Employment Act*.
>
> 9. 14.6.2 A letter detailing the facts of the case and giving reasons for recommended dismissal will be sent to the individual and a copy placed in his personal file. The employee will be provided with an opportunity to answer within twenty-one [21] days." [Emphasis mine]

172. The Respondent contended that the accusations against the Claimant amounted to a serious misconduct. In fact, its Counsel submitted that they amounted to a gross misconduct, that could have attracted a summary dismissal. In view of this, I hold that the postulations above, were applicable to the proceedings that led to the termination of the Claimant's employment.

173. On the 24th October 2014, the substantive CEO of the Respondent, issued the Claimant with a notice to show cause. The last paragraph thereof stated;

> " You are therefore required to show cause within Seven days why disciplinary action should not be taken against."

174. The seven days, is not what the Manual Contemplated. I agree with the Claimant that the same wasn't in accord with section 9.14.6.2 of the Manual. At entry of the contract of employment, the parties considered 21 days to be a reasonable period within which, a reasonable response would be made

to a notice to show. One cannot understand why the Respondent decided to blatantly disregard an express provision of its own policy and procedure manual. The Respondent explained not why. I am not persuaded that the Respondent can be allowed to find comfort on the fact that the Claimant did respond to the same. I agree with the latter that though he responded, the notice was inadequate. Further, this goes a long way to demonstrate that the action of the Respondent suffered destituteness in good faith.

175. There is now firm jurisprudence that the procedure provided for in section 41 of the *Employment Act* is mandatory, and non- adherence to the same by an employer has the effect of rendering the termination of an employee's employment unfair pursuant to the provisions section 45 of the Act. As regards the mandatory nature of the provision, the Court of Appeal in the case of Prof. *Macha Isunde- vs- Lavington Security Guards* stated;

> " There can be no doubt that the Act, which was enacted in 2007, places a heavy legal obligation on employers in matters summary dismissal for breach of employment contracts and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating [section 43]-prove that the reasons are valid and fair [section 45]-prove that the grounds are justified [section 47[5]. Among other provisions. A mandatory and elaborate process is then set up under section 41, requiring notification and a hearing before termination." [Emphasis mine.]

176. I hold there was notification. I now turn to consider the aspect of hearing. The Respondent's second witness [Rw2] in his witness statement stated;

> " 14. That the Respondent was dissatisfied with the explanation made by the Applicant and they invited him, by a letter dated 27th March 2015, to appear before the staff and Welfare Board committee, a sub- committee of the Board of Directors which has the legal mandate to hear disciplinary cases in respect of employees. A copy of the letter is attached as Appendix IV.
>
> 15. That the notice to appear before the committee dated 27th March 2015 was timeously received by the Claimant who appeared before the committee on the 18th of June 2015, about three months after the notice to attend the hearing was received."

177. I have carefully looked at the letter, it read in part;

> " ..... The Staff and Welfare Committee of the Board will be meeting on Tuesday, 31st March 2015 to review the matter and make recommendation[s] to the Board.
>
> You are hereby invited to appear before the Committee between 12.00-2.00 pm to further clarify on the issue the Committee may have on your written response. The meeting will take place in the Authority's 18th floor Boardroom."

178. The Claimant in his pleadings contended that there was no meeting that was held pursuant to this invitation letter. He was never heard pursuant to this invitation or at all.

179. The Court has carefully considered the contents of the letter, and two critical things emerge that are contrary to the assertions by the witness; the letter doesn't invite the Claimant for appearance for the 18th June 2015 but 31st March 2015; the letter wasn't inviting him for a disciplinary hearing. Without

prejudice to this, I have looked at the minutes of a meeting that allegedly took place on the 18th June 2015, minute 03/18/6/15, clearly tells it all, the Claimant never appeared before the committee[s] as purported. I am persuaded that there was no meeting on the 31st March 2015. In their evidence under cross examination, the Respondent's witnesses acknowledged that there was no document in Court, that would demonstrate that there was such a meeting.

180. The Respondent's second witness in his statement as hereinabove brought forth, purported that the Claimant was heard in a meeting that was held on the 18th June 2015, and that the Claimant was heard thereat. Looking at the alleged minutes of the day, Claimant's Exhibit 15, The minutes are clear, the Claimant was not present.

181. The Claimant was placed on interdiction on the 28th October 2015, pending conclusion of investigations, reasonableness required the Respondent to give the Claimant an opportunity to defend himself at a time when there was a substantially established case attained after investigations. Any adverse findings against an employee borne out of any investigations by the employer or any person requested to so investigate must be brought to the attention of the employee for a representation thereon, before the employer can make an adverse decision against the employee. The Respondent didn't place any material before this Court, demonstrating that after the interdiction or after the Judgment in the Judicial review application, investigations were done and if they were, that the Claimant was given an opportunity to make a representation on the findings, and the accusations that had been levelled against him in compliance with the provisions of Section 41 of the *Employment Act*.

182. The Respondent's witnesses were clear in their evidence under cross examination, that the Respondent didn't place any minutes before the Court or material showing that there was a disciplinary hearing against the Claimant, or report by the Staff Welfare Committee recommending termination of the employment of the Claimant.

183. There is no dispute that after the termination, the Claimant filed an Appeal against the decision. This pursuant to the section 9.19, of the Manual which guaranteed employees a right to appeal. Section 9.19.5.1 provided a right to an employee who has exercised his right of appeal to make an oral representation on his or her appeal if he so desired. Section 9.19.7 provided;

> " A disciplinary Appeals Committee appointed by the Chief Executive Officer constituting of senior employees of NACADA who have not been involved in the disciplinary process complained about shall review all appeal cases appraised by the HR Department and make their recommendations to the Chief Executive Officer or the Board for a final decision."

184. The Claimant contended, and indeed the Respondent's witnesses admitted that the Appeal was not heard. In its letter dated 16th December 2016, in response to the Claimant's letter that sought to know the fate of his appeal, the Respondent's CEO, in part wrote;

> " ..... We note the sections of the NACADA Human Resource Policies and procedure Manual that you have quoted in the above referenced letters. However, having cleared with the Authority and consequently received your benefits in full, the manual no longer applies in your case."

185. I have considered the stipulations of the manual, nowhere it is provided that an employee was not supposed to clear with the Respondent pending his appeal. Nowhere it is provided that undertaking the clearance process would amount to a waiver of his or her right to be heard on the appeal. The Respondent denied the Claimant his contractual right of appeal, without any reasonable and or justifiable reason. To deny an employee his contractual right of appeal renders the termination process

technically incomplete, and procedurally unfair. It exhibits bad faith and malice on the part of the employer.

Whether the termination of the Claimant's employment was substantively unfair.

186. In order to establish that the contract of service of an employee was substantively justified, the employer is enjoined to discharge the burdens bestowed on an employer, by the stipulations of section 43, 45[2] and 47 [5] of the *Employment Act*. Sections 43 require the employer to prove the reasons for the termination, while section 45 [2] demands of an employer to prove that the reason[s] was valid and fair, related to the employee's conduct, capacity and compatibility. Under section 47 [5], he is enjoined to prove that the grounds were justified.

187. The Respondent contended that the grounds upon which the Claimant's employment was terminated were as brought out in the notice to show cause letter dated 24th October 2014, eventually enveloped in the termination letter dated 1st November 2016.

188. The termination letter read in part:

> " ..... The Board during its special meeting held on 31st October 2016 discussed the grounds of your interdiction and your response to the allegations levelled against you and observed that;
>
> i. There was negligence and omissions in undertaking your duties as provided for in section 9.11.12 part [iii] and [Xii] of the Authority's Human Resource and Procedures manual 2012;
>
> ii. You acted contrary to the circular No. OP/PA/27A of 14th February 2014 as no authority was obtained to advertise in the media;
>
> iii. You acted contrary to National Treasury circular No. GP 2014 of 13th May 2014 that required public entities to obtain written authority from the National Treasury before entering into the new commitments from 15th May 2014;
>
> iv. There was breach of sections 8 and 10 of the Public Procurement and disposal Regulations 2006 as you failed to involve institutions that are key in processing procurement requirement unit and the tender committee.
>
> v. There was breach of section 20 [3] of the Public Procurement and Regulations 2006 as the subject transactions were not planned as required.
>
> vi. In undertaking the procurement in question, section 197 [1] [h] of the *Public Finance Management Act* of 2012 was breached as well as Article 226 [5] of *the Constitution of Kenya 201*0."

189. There is no doubt that the interdiction against the Claimant was an investigatory interdiction. The interdiction letter dated 28th October 2015, read in part;

> " In view of the above, the Board resolved that you be interdicted with immediate effect as the authority awaits finalization of investigations by the relevant authorities."

190. From the material placed before this Court, the staff welfare committee, a committee which was charged with the responsibility of employee discipline did not at any time recommend that the

Claimant's employment be terminated. The only recommendation that they made on the Claimant's case was that he be subjected to an investigatory interdiction. The Board got satisfied this decision. One would reasonably expect that after the investigations, the matter would get back to the committee for a final decision by the same before being forwarded to the full Board for action. There is no evidence that the investigations were carried out. There is none too that the committee ever made a final recommendation for termination of the Claimant's employment. In fact, the tone of the termination letter is clear, there was none.

191. Section 45 [4] provides:

> " A termination of employment shall be unfair for the purpose of this part where –
>
> a. The termination is for one of the reasons specified in section 46; or
>
> b. It is found out that in all the circumstances of the case, the employer did not act in accord with justice and equity in terminating the employment of the employee."

Blacks 'Law' Dictionary, 10th Edition defines investigations, thus;

> " The activity of trying to find out the truth about something; such as crime, accident, or historical issue; esp. either an authoritative inquiry into certain examination ....."

192. I am of the view that the disciplinary organ of the Respondent authority did not make the recommendation that the investigations by the other Government Agencies be awaited, before a final decision on Claimant's alleged misconduct without a compelling reason, for the Board to act as it did without investigation reports from the Government's Agencies and a final decision and recommendation by the Staff Welfare Committee, cannot be stated to be an act in justice and equity.

193. The Court has here-above dealt with the manner the Claimant's Appeal was handled by the Respondent, I am of the view that in as much as it did speak to procedural unfairness of the termination of the Claimant's employment, it also did to substantive unfairness, considering the provisions of section 45 [5] of the Act which *inter alia* proves;

> 5. In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer or the Industrial Court shall consider –
>
> a) The procedure adopted by the employer, in reaching the decision to dismiss the employee, the communication of the decision to the employee and the handling of any appeal against the decision." [Emphasis mine]

194. There is no dispute that the contract that were between the Respondent and the Kenya Broadcasting corporation [KBC] was reviewed and executed by the Legal Department of the Respondent, before being forwarded to the Claimant for onward transmission to KBC for necessary action. The Legal manager was at the centre of the procurement process therefore, it is on record that in her representations on the accusation against her, she stated that she misled the Acting CEO. The Board in its wisdom "severely reprimanded "her. The Communications and Documentation manager, and Ms. Madina Ibrahim was also deeply involved in the procurements they were adjudged guilty of misconduct, all these as can be discerned from the Board minutes for the meetings of 9th June 2015 and 7th July 2015, particularly minute Number 13, were too "severely reprimanded" at the recommendation of Staff Welfare Advisory Committee. The witnesses who testified on behalf of the

Respondent were in agreement on one thing the sanction that was meted against the Claimant was heavier. However, in the sanctioning, yet the subject accusation against all the four. I am impelled to conclude that the Board didn't act with equity considering the stipulation of section 45 [5] [d] – the previous practice of the Respondent in dealing with the type of circumstances which led to the termination.

195. Section 45 [2] enjoined the Respondent to prove that the termination was on account of valid and fair reason. I have no doubt in my mind that it did not. Under minute 13 above stated, the sub-part captioned, "committee recommendations", it was captured "the committee therefore recommended disciplinary action by the Board committee against the Ag. CEO for the following offences which are classified as gross misconduct in both the Authority's, its manual [section 9.11.1] and section 4 [c & d] of the *Employment Act*: -

    a. Negligence and omission in undertaking his duties as provided in section 9.11.12 part iii and xii of the Authority's Human Resources and Procurement Manual of 2021.

    b. Non-adherence to Government directives in particular: - Circular letter dated 14th February 2014 from the PS, Interior or Cabinet's decision on advertisements and National Treasury's directive of 14th May 2014 that public entities are not to enter into new commitments from 15th May 2014.

    c. Breach of Public Procurement and Oversight Act, 2005 and Regulations of 2006.

    In both the Human Resource Manual and *employment Act*, punishment for gross misconduct - offences and summary dismissal or even prosecution. The committee recommended that the former Ag. CEO Mr. Enock Onchweri be interdicted with immediate effect pending further investigations by the relevant authorities."

196. Having decided to have facts surrounding the accusations investigated first before any disciplinary action would be taken against the Claimant, to proceed and adjudge him guilty upon reasons that were to be subjected to or were a subject of further investigations, before the investigations or conclusion of the same, makes this Court conclude that the reasons were not valid and fair in terms of section 45 [2] of the Act. As Justice Nderi stated in the Judgment in the Judicial Review Application, one cannot second guess the outcome of investigations.

197. The Respondent didn't act with probable cause since it did not reasonably investigate the accusations. See Mennissota Court of Appeal decision in *Wiring v Kinny Shoes Corp*. 448 N.W 2d 536,532 [Minn. Ct.App.1989].

198. A reason or reason[s] for termination of an employee's employment can only be fair if the employee was given an opportunity to defend himself on the reasons. Absence of this erodes the validity and fairness of the reason[s] and decision by the employer.

199. I have really agonized over this, from the minutes of the various meetings on the crisis that led to the procurement of the KBC Media Services, it is clear that the item on the intervention measures that had been and were being undertaken by the management then under the leadership of the Claimant, inclusive of the KBC Media services, were brought to the attention of the Board, and deliberated on. The intervention measures were not at all done under the table but were with the full knowledge of the Board of the Respondent. The letter dated 8th October 2015, by Hon. John Min. Mututho, who was at the material time the Chairman of the Board, addressed to the Director General Public Procurement

Oversight Authority, in response to the latter's letter dated 18th September 2015, leaves no doubt that the procurement was with the knowledge and approval of the Board. The Respondent's 1st witness admitted under cross-examination that indeed the letter was done by the Chairman of the Board.

200. The contents of the letter which in essence exonerates the Claimant from blame, were not at all challenged by the Respondent. There was no suggestion that the same was not warranted or that it was done in bad faith. The exhibited knowledge on the part of the Board, its implicit approval of the procurement, and absence of any protest as regards the procurement during the crisis, and the consumption of the media houses' services, would have been point enough to prompt any reasonable employer not to hand down a sanction like the one that was handed down to the Claimant. Put in another way, no reasonable employer would have in the circumstances of the matter, terminated an employee's employment.

201. It is my view that a Chairman of a Board of an organization shall always be taken to be corresponding on behalf of the Board, on matters transaction of the Board and or the organization, whenever he corresponds, not unless the correspondence in itself reflects that he is so corresponding in his or her own personal capacity, or that the contents thereof are his own personal views, or that the same was done in bad faith, maliciously and unlawfully. I take the letter above-stated to be reflective of the position of the Respondent organization then under his headship.

202. The letter clearly explained to the Director General, that the procurement was an emergency procurement. It was not subject therefore to the strictures of the *Public Procurement and Disposal Act*. This fortified the Claimant's position. That the procurement was done without following the strict guidelines of the Act, on an account that the procurement did fall under the exemptions under the Act. The Respondent wouldn't therefore turn around and start asserting that the procurement was not one of those exempted, and make it a ground to terminate the Claimant's employment. The ground won't and be fair.

203. Contrary to the alleged ground for the termination, that procurement of media services was not planned for, the Chairman's letter, which I have held reflected the position of the Board, procurement of media services was budgeted for. He stated;

> "From the above, it is very clear that the procurement was done under emergency procurement. On 4th June 2014, the Board approved a budget of Kshs. 25,260,878 – for media procurement to address the crisis, [Emphasis mine]. Out of this only Kshs. 23,434.469 was spent. These were procured under emergency. The Kshs. 47,792,000 for services rendered from KBC was to address the crisis which had spread all over the country and it is the only media company that reached all the parts of the country through TV and FM radio stations. KBC is a Government Institution that is not subject to the PP & BA 2005."

204. It is clear therefore that at all material times the Board through its actions gave a representation that the procurement was sanctioned, proper and deserved, the principle of estopped operated against them or the organization or any other person, to use any result therefrom to the prejudice of the Claimant and or any other employee.

205. The termination letter indicates that the termination of the Claimant's employment was inter alia on the ground that he acted contrary to circular No. OP.PA/27A of 4th February 2014 as no authority was obtained to advertise. The Claimant contended that the circular was not given to him at any time. That the Respondent did not tender the same before Court. I agree with the Claimant that the circular was not placed before this Court. The witness [RW2] for the Respondent was unable to explain why.

I am left with no option than to make an adverse inference that the circular was not in existence and if it did, the contents thereof would be prejudicial to the Respondent's case. The reason was neither a valid nor a fair one for the termination therefore.

206. By reason of the above premises, I hold that the termination was substantively unfair.

Whether the Claimant is Entitled to the Reliefs Sought.

207. The Claimant sought for inter alia compensation equivalent to the gross salary for the remainder of his contract period. It is trite law that such is not awardable owing to the manner the provisions relating to remedies available to an employee whose employment has been unfairly dismissed, under the *Employment Act* have been structured. Addressing this in *Alphonse Maghagha Mwachama v Operation 680 Limited* [2013] eKLR Justice Radido rendered himself thus;

> "it would not make sense and it was not the intention of the *Employment Act* and the Industrial Court Act to award employees whose fixed term contracts had been terminated prematurely generous damages equivalent to the salary which would have been earned during the remainder or un-served term of the contract and restrict compensation to a maximum 12 months' for employees who were in permanent employment, but were terminated unfairly. It would not be fair and just as a matter of legal principle to treat employees on fixed term contracts differently from employees on permanent contracts, who should have been unfairly terminated."

208. I am persuaded by this holding and decline to award the sums sought by the Claimant and the limb.

209. However, I hold the view that the limitation imposed by the Act as regards the maximum awardable damages thereunder, sometimes impedes sufficient availing of the expansive protection to employees that was contemplated by the enactment of the Labour Relations Legal Regime that came in in 2007. Sometimes peculiar circumstances of a case may call for an award beyond the 12 months' gross salary, more especially when it is crystal clear that the employer acted with impunity, grave malice and bad faith, but the Court gets its hands are tied by the ceiling. since the court's hands are tied. It is high time the legislature considered whether or not with the imposition of the ceiling employees are adequately protected.

210. The Claimant further sought for reinstatement in the alternative to the compensation herein above mentioned. As much as the circumstances of this matter would have appealed for a reinstatement, a grant of the relief for reinstatement cannot be availed to the Claimant as it is now beyond three years since the date of the termination. This is another ceiling in our laws that needs to be reconsidered. For instance, could fair it be to an employee, who files a claim following an unfair termination within the 1st month of the termination, but cannot get a deserved reinstatement because his case is concluded after three years of the termination?

211. The Claimant further sought for damages on an allegation that he was discriminated against. I have found hereinabove that in terminating his employment the Respondent didn't act with equity and justice, a factor I shall take into account when making an award under section 49[1][c] of the *Employment Act*. Therefore, the Court is not prepared to delve into the issue of discrimination and make an award thereunder. That shall result to over-compensation.

212. Section 49[1][c], bestows upon Court the authority to grant a compensatory award for an employee who has successfully assailed the unfairness in a termination of his employment. The grant is discretionary dependent on the peculiar circumstances of each case. In this matter I have taken into consideration the; Un-served period of the Claimant's contract ; the procedural and substantive

unfairness that were present in the termination; the holding by this court that the termination was without good faith, but with malice; the fact that the Claimant has remained unemployed since he was terminated following the manner he was removed from office; and the fact that this court has decided not to grant other damages separately, and come to a conclusion that he is entitled to the award of the relief and to the extent of 12 months' gross salary. Therefore, Kshs. 4,476,000.

213. Employment defamation may occur both during employment such as in an investigation or disciplinary action related to an employee's conduct or after employment when an employer is asked to comment on an employee's work record or qualifications. Often defamation cases are brought in conjunction with unfair, and or wrongful termination claims.

214. The Respondent contends that the Claimant's claim for general damages for employment defamation must fail, as the Claimant did not establish that he had suffered reputational damage in the eyes of members of society. Too that he didn't call any members of society to testify in support of his claim. A negative reference or employment action may cost an employee his good reputation or live hood. It can be safely said that it is due to the significant impact that the defamation can have on an employee that employment defamation is defamation perse, meaning that the Claimant needed not prove specific damages in order to prevail. The Respondent's contention ignores this.

215. There is no denial that the Respondent's CEO wrote to various Government Agencies, accusing the Claimant of mal-procurement of services, and sought that investigations and action be done and taken on him, respectively. The then Chairman in the letter that this court mentioned herein above wrote to the General Director PPOA and copied the same to several Government offices, stating that the CEO, had deliberately misled the Government Agencies. In essence he was saying that the statements that CEO had made in the correspondences to the various agencies were false as regarded the Claimant.

216. The Claimant contended that owing to manner he was removed from office and the correspondences that the Respondent made to the various agencies, correspondences whose contents were not true, his employability dipped. He has not been able to get any employment despite numerous applications. This evidence in my view was not shaken.

217. In conclusion, the correspondences that the Respondent's CEO made were not general statements of pure opinion but were sufficiently factual to be evaluated for truth or falsity. The Claimant suffered employment defamation, and for that the Court awards him general damages of Kshs. 500,000.

218. In the upshot this Court enters Judgment in favour of the Claimant in the following terms;

    a. A declaration that the termination of his employment was procedurally and substantively unfair.

    b. Compensation pursuant to the provisions of section 49[1][c] of the *Employment Act*, Kshs. 4, 476,000.

    c. General damages for employment defamation, Kshs. 500,000.

    d. Interest on [b] and [c] above, at Court rates from the date of filing this suit till full payment.

    c. Costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF APRIL, 2022.

OCHARO KEBIRA

JUDGE

Delivered in presence of:

Ms Oyugi for the Claimant.

Ms. Mumbo 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 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution}} and the provisions of Section 1B of the 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