Kazungu v Kenya Marine and Fisheries Research Institute (Cause 55 of 2020) [2022] KEELRC 1522 (KLR) (17 June 2022) (Judgment)

Neutral citation: [2022] KEELRC 1522 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE 55 OF 2020

B ONGAYA, J

JUNE 17, 2022

BETWEEN

JOHNSON KAZUNGU ..... CLAIMANT

AND

KENYA MARINE AND FISHERIES RESEARCH INSTITUTE .... RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim on 17.12.2020 through S Musalia Mwenesi Advocates and mr Stephen Mwenesi and ms Clare Wanjiru Advocates acted for the claimant in that behalf. The claimant prayed for judgment against the respondent for:

    i. A declaration that the respondent's actions and conduct amount to violation and infringement of the claimant's constitutional rights and fundamental freedoms under Article 24(1), 28, 41, and 47 (1) of the *Constitution*, 2010 amounting to unfair labour practice and violation of the claimant's rights under the *Employment Act*, 2007.

    ii. A declaration that the respondent has no justification to down scale the claimant's CEO exit salary of ksh 486, 490.00 pm as approved by the Board in its 71st session of 08.12.2011.

    iii. A declaration that at the time of change to Chief Research Officer the claimant had been the Director or Chief Executive Officer earning a total monthly salary of ksh 486, 490.00.

    iv. A declaration that the respondent's Board of Management had no basis or justification for the amount offered to the claimant ksh 8, 928, 672.00 in the guise of payment of salary arrears from 01.07.2014 to 31.10.2019.

    v. A declaration that by the action of the Board at its meeting on 31.10.2019 the respondent acknowledged that it was indebted to the claimant but failed to meet the debt demand squarely and properly.

vi. An order that the claimant is entitled to the balance of his arrears of salary ksh 23, 132, 244.00 with interest thereon at Court rates from the date of filing the suit to the date of payment in full.

vii. An order of prohibition be and is hereby issued prohibiting and restraining the respondent, its officers, agents, employees or any other person from reducing, cutting, or slashing the claimant's salary and other allowances on the basis of circular ref no OP/SCAC.1/12(II) whose terms in the case of the claimant are unlawful and unjustified to the extent that it has the effect of taking away the claimant's rights which had crystallized on the date of the claimant's exit from the position of Chief Executive Officer of the respondent and returned to the rank of Chief Research Officer.

viii. A declaration that the severe reprimand in the letter dated 12.11.2020 is unprocedural and unwarranted and unjustified in the circumstances of the claimant's case and null.

ix. An order for resumption of payment of the claimant's CEO's exit salary (exit basic salary of ksh 320, 000, exit house allowance of ksh 80, 000, exit medical allowance of ksh 2, 490, exit commuter allowance of ksh 24, 000, and other remunerative allowances of ksh 60, 000) with effect from 01.07.2014 to June 2019 together with access to the respondent's Group Medical Insurance Cover.

x. Compensation at 12 months at the rate of the claimant's CEO exit gross for unfair labour practices and violation of the claimant's constitutional rights and fundamental freedoms by the respondent as pleaded in paragraph 34 of the memorandum of claim and as compensation under Article 23(3) (e) of the *Constitution* of Kenya, 2010 for constructive dismissal as pleaded in paragraph 45 of the memorandum of claim.

xi. Damages at ksh 100, 000.00 equivalent to the fine payable under section 25 of the *Employment Act* cap 226 for remuneration wrongfully withheld and wrongfully deducted from the claimant.

xii. Costs of the suit with interest thereon at Court rates.

xiii. Any other relief or directions the Court deems fit and just.

2. The learned Litigation Counsel ms Rukiya A Ibrahim and ms Opio A Immaculate for the Honourable Attorney General acted for the respondent. The respondent failed to file a statement of response to the memorandum of claim within the time prescribed in the Court's rules of procedure and the Court ordered the suit to proceed by way of formal proof.

3. The claimant testified to support his case. By consent of the parties' counsel at the hearing on 10.03.2022, all documents filed for the claimant were admitted in evidence as filed and as per the bundles on record including the one duly paginated re-filed on 25.01.2021.

4. The respondent is a state corporation within the definition under the *State Corporations Act*, cap 446 Laws of Kenya and is established under the *Science and Technology Act*, cap 250 (now repealed). Its mandate is to undertake research in marine and freshwater fisheries. It continues to operate as an existing research institute as per section 53 of the *Science, Technology and Innovation Act*, 2013. There is no dispute that the respondent employed the claimant as an Assistant Research Officer on Permanent and Pensionable terms of service by a letter of employment dated 01.11.1980 and over the years of service the claimant was promoted to senior ranks in the unbroken service with the respondent. The evidence is that the claimant is a Marine Chemist at PhD level having trained locally and abroad. As per his exhibited curriculum vitae and testimonials he is holder of BSc (hons) – Chemistry conferred by

the University of Nairobi (1977 - 1980); Certificate in Resource Policy and Management by the United Nations University, Tokyo (1981 - 1984); MSc (Fisheries Oceanography) by the Tokyo University of Fisheries, Japan (1982 – 1984); and PhD (Marine Chemistry) by Vrije University of Brussels, Belgium (1991 – 1996) with a thesis on "Nitrogen Transformational Processes in a Tropical Mangrove Ecosystem (Gazi Bay – Kenya)."

5. Thus, by letter dated 24.07.2000 the respondent appointed the claimant to the position of Director and the letter in part stated thus,

> " "... You will receive salary and allowances attached to the post of Director as set out in the terms and conditions of service for employees of Research Institutes currently in force. As a chief Executive of the Institute, you will be responsible to the Board of Management for its day to day management."

The claimant testified that he served as Director for 15 years. Further, as Director, he initially served on Permanent and Pensionable terms per the terms and conditions of service of the respondent's employees (per the letter of appointment dated 24.07.2000). Five years into the service as the Director, he was emplaced on three-year fixed term contracts renewable upon good assessment by the respondent's Board.

6. The further evidence is that in 2014 such of the three-years' contracts was lapsing. The claimant wrote the letter dated 25.06.2014 to Professor Micheni Ntiba, Permanent Secretary, State Department of Fisheries. The claimant explained in that letter that he had already served for three terms as the respondent's Director and his request for renewal of the contract had been channelled to the parent Ministry for final decision in accordance with the prevailing Government policies He further conveyed that upon consultation he considered the three terms he had served as Director to be adequate and he had decided to revert back to his position of Chief Scientist at the terms approved by the Board on career scientists who are appointed Directors and upon expiry of their term of office the contract had not been renewed. He requested by that letter that the in-coming Director translates his terms of service to those of Chief Research Officer (CRO) effective 01.07.2014 in line with the respondent's Board resolution on similar circumstances. He further conveyed that he was proceeding on leave till September 2014 to resume as CRO to concentrate on research and assist in coordination and generation of value added products from research conducted at the respondent institute. The letter was copied to the respondent's Board Chairperson Professor Penninah Aloo and the Acting Director dr Renison Ruwa. The claimant's testimony was that as at 30.06.2014 the term of the respondent's Board was expiring and the outgoing Board had recommended the renewal of his contract of service. As he had not received Ministerial approval of his renewal, he had written the letter dated 25.06.2014.

7. The claimant has exhibited the minutes of the 71st session of the respondent's Board of Management meeting held on 08.12.2011. The minutes show that at 4.2 the Board considered Board Paper no 2 being the report from the 62nd Session of Finance and Establishment Committee (F&EC) by Professor Evans Aosa and the Board resolved to adopt the report as proposed by Professor Shaukat Abdulrazak and seconded by dr John Onyari. The Board thereby adopted the Scheme of Service for Research Scientists and in particular as follows:

> " 4.2.2.2 Members noted that the Committee recommended that the Director and Deputy Directors be put on renewable contract based on performance and provide for a fall back after expiry of their tenures.
>
> 4.2.2.3 Members noted that the Scheme of Service for research scientists provided for a Chief Research Officer position where the Director and Deputy Directors

could fall back to in the event their contracts are not renewed but retain salaries personal to themselves."

8. The claimant testified that by that Board resolution, if the CEO's (Director's) contract was not renewed like in his case, then he was entitled to revert to the position of CRO but retaining the CEO's terms of service personal to himself. In accordance with that resolution, he had made the request in his letter dated 25.06.2014 and which the respondent replied by the letter being exhibit (annex) 6 at page 181 of the bundle signed by the respondent's Acting Director dr Renison Ruwa, PhD MBS. The letter informed the claimant that his request to have his terms of service translate to Permanent and Pensionable terms of service in the position of CRO had been accepted effective 01.07.2014 and he would continue to earn his current salary of ksh 320, 000.00 per month which would be treated as basic and personal to the claimant. The letter further stated that the claimant's house allowance and other allowances would be pegged to the position of Chief Research Officer (CRO) as stipulated in the respondent's terms and conditions of service. Further, the claimant would contribute 7.5% of his basic salary and the respondent would contribute 15% towards the claimant's pension. Other terms of service would remain the same. The claimant has exhibited his pay slips dated 31.07.2014 and 31.07.2015 showing his particularised monthly pay as follows:Basic pay ksh 320, 000.00.Commuter allowance ksh 16, 000.00.House allowance ksh 40, 000.00.Medical Allowance ksh 2, 490.00.Total earnings ksh 378, 490.00.

9. The claimant has also exhibited his pay slip dated 30.06.2014 (the last monthly pay as Director or CEO) showing particularised monthly payment as follows:Basic pay ksh 320, 000.00.House Allowance ksh 80, 000.00.Medical Allowance ksh 2, 490.00.Responsibility Allowance 80, 000.00.Total earnings ksh 462, 490.00.

10. The claimant's case is that his House Allowance ought not to have been reduced to ksh 40, 000.00 but it ought to have been retained at ksh 80, 000.00 which he earned as a Director and pursuant to the Board's resolution.

11. The claimant has also exhibited his pay slip dated 31.08.2015 which particularised his pay as follows:Basic pay ksh 144, 928.00.Commuter allowance ksh 16, 000.00.House allowance ksh 40, 000.00.Medical Allowance ksh 2, 490.00.Total earnings ksh 203, 418.00.

12. The claimant testified that his basic salary was reduced from ksh 320, 000.00 to ksh 144, 928.00 and he was told that a circular had issued that he reverts back to the salary in the position. The claimant has exhibited the circular ref no OP/SCAC.1/12(11) dated 14.05.2015 and addressed to all Cabinet Secretaries; the Attorney General; and All Principal Secretaries and signed by Joseph Kinyua, CBS, Chief of Staff and Head of the Public Service. The circular referred to the establishment of the State Corporations Advisory Committee (SCAC) under section 26 of the *State Corporations Act* cap 446 and SCAC's advisory mandate under section 5(3) and 27(c) of the Act. The circular stated that SCAC had at its meeting of 16.10.2014 considered the matter of terms and conditions of service for retired Chief Executive Officers (CEOs) of State Corporations who revert back to serve in the same institutions in other capacities and SCAC had observed as follows:

    a. The practice of retired CEO reverting to serve the same institution in other capacities is most common in Research Institutions and Public Universities.

    b. Retaining retired CEOs in academia and research is a healthy global practice that enriches the body of knowledge in the institutions. However, in some instances, the CEOs who revert retain the perks for their former administrative positions creating unnecessary power games and competition with their successors.

c. Retaining the perks attached to the position of CEOs in the above circumstances would be inordinately expensive and unsustainable to the affected institutions.

13. The circular then concluded thus,

> "“It is required that all State Corporations should ensure that staff in their employment only enjoy remuneration and privileges that fall within the regular terms and conditions of service commensurate to their substantive appointment and grade. More specifically, staff in Research Institutions and Public Universities who retire as Chief Executive Officers but opt to revert to research/teaching roles when their tour of duty as CEOs lapse, should be required to adopt the perks attached to the newly assigned lower grade."

14. Purportedly in line with that circular, the respondent's Acting Director and CEO addressed to the claimant the letter dated 21.08.2015 conveying that in view of that circular, the respondent's Board at the 80th session deliberated the same and had resolved to review the claimant's terms and conditions of service in compliance with the provisions of the circular. Thus, the letter stated that the claimant's salary and allowances had been adjusted in line with his current position as Chief Research Officer (CRO) Job Group RI.14 within the salary scale ksh 109, 080...-ksh 144, 928.00 and his basic monthly salary with effect from 01.08.2015 to be ksh 144, 928.00 with monthly remunerative allowances being as follows:Commuter allowance ksh 16, 000.00.House allowance ksh 40, 000.00.Medical Allowance ksh 2, 490.00.

15. The claimant then received the pay slip dated 31.08.2015 as earlier referred to in this judgment. The claimant's case was that he still earned the salary as conveyed as at the time of hearing the suit despite the Salaries and Remuneration Commission readjusting upwards the salaries for all staff including the CROs and effective 01.07.2020.

16. The claimant's further case is that in the meantime, the Court (Wasilwa J) rendered judgment on 23.02.2018 in *Republic v Chief of Staff & Head of Public Service & 2 Others Ex-parte George A.O. Magoha* [2018] eKLR. In that case the Court held as follows:

a. Pursuant to Article 47(3) of the *Constitution*, Parliament enacted the *Fair Administration Action Act* no 4 of 2015 and the elaboration in section 4 of the Act had the effect that where an administrative action would affect an individual, that individual should be given an opportunity to be heard. In that case (like in the claimant's case) the applicant had not been heard of an administrative action that adversely affected him.

b. The circular letter (being the same circular ref no OP/SCAC.1/12(11) dated 14.05.2015 and in issue in the instant case) was given in form of a directive and no room for negotiation was left so that the same amounted to unilateral amendment to a condition of employment without recourse to negotiation or appeal (in internal processes as envisaged in section 4(3) (c) of the Act).

c. The unilateral taking away of superior terms of service by way of the circular's directive breached section 26 (2) of the *Employment Act*, 2007 which states,

> "(2) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable

to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply."

Further such unilateral withdrawal of accrued terms of service breached section 10 (5) of the *Employment Act*, 2007 which provides,

> "(5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing."

d. The effect of the action of the respondent as to apply the circular retrospectively taking away accrued right and without consultation with the applicant in that case was an impropriety and unlawful.

e. The Court upheld Nakuru ELRC JR no 1/2016 *Professor James Tuitoek v Chief of Staff and Head of Public Service and Egerton University* (Radido J) that circular ref no OP/SCAC.1/12(11) dated 14.05.2015 was in general terms and could not take away accrued terms and conditions of service and could only operate futuristically and not retrospectively.

17. The claimant's case and testimony was that he addressed to the respondent his letter dated 16.04.2018 drawing the respondent's attention to the judgment by Wasilwa J in *Republic v Chief of Staff & Head of Public Service & 2 Others Ex-parte George A.O. Magoha* [2018] eKLR. The claimant stated that it was unfortunate that his salary was abruptly down-scaled by reason of the circular to a salary scale he had operated on 20 years ago in 1997 prior to appointment to the office of CEO and contrary to the Board resolution in 2011 that he retains a salary of CEO personal to himself. The claimant wrote to the respondent the letter dated 21.08.2018 urging that if the respondent was unable to resolve his grievance internally, then an external legal assistance ought to be obtained. The claimant's case is that the circular date ref no OP/SCAC.1/12(11) dated 14.05.2015 came long after he had been conferred the CEO terms personal to himself and it could not apply to him retrospectively as per the cited decided cases.

18. The claimant's further evidence and case is that the respondent sought external advisory from the Honourable Attorney General by the letters dated 25.03.2019 and 16.05.2019. The Attorney General replied and rendered an advisory opinion by the letter ref no AG/CONF/21/75/3VOL.I dated 25.06.2019. The advisory extensively reproduced the law and cited the decision by Wasilwa J in *Republic v Chief of Staff & Head of Public Service & 2 Others Ex-parte George A.O. Magoha* [2018] eKLR. The advisory was signed by Kennedy Ogeto, EBS, Solicitor General and conclusively guided the respondent thus,

> "29. Accordingly, it is our considered view the exit package negotiated between dr Kazungu and the Institute constitute an accrued right which is crystallised in a binding contract and whose terms thereof, may only be varied by mutual agreement between the parties.
>
> 30. The Government circular is a policy instrument which is applicable to prospective employment relations concluded after its effective date. The circular would not affect any accrued rights arising from any contract concluded before it came into effect."

19. The claimant's case is that the respondent failed to implement the opinion and binding advisory by the Attorney General. Instead, the respondent summoned the claimant and caused him to sign two documents on 31.10.2019 and without any prior knowledge of the agenda of the summoning on

31.10.2019. His testimony was that he received a letter inviting him to a meeting on 23.10.2019 but come that date he got no information. Further testimony is that on 29.10.2019 the Assistant Director send to the claimant an email that a meeting would be held at North Coast Hotel on 31.10.2019 at 10.00am. The claimant testified that he arrived at the Hotel at 10.00am and was shown a place to sit and by Noon he had got no information when, a secretary came to him and stated that the claimant had waited for a long time but then the Board had decided to conclude his case at the Head Office. Further, the Board members arrived at the Hotel at about 3.30pm and gave the claimant two documents to sign and both witnessed by hon John Safari Mumba, the respondent's Chairman of the Board of Management.

20. The first document he was given to sign was an acknowledgment of exit package of ksh 8, 928, 672.00 and it was drawn on the respondent's letterhead and stated, "I, dr Johnson Kazungu accept the exit package of ksh 8, 928, 672.00 (Eight million, nine hundred and twenty-eight thousand, six hundred and seventy-two only) as arrears for the contract dated 1st July 2014 to 31st October 2019." The claimant signed it on the 31.10.2019 and his testimony was thus, "One member told me to simply sign so I get assistance in view of my health issues. Chairman told me to sign because I had gone through problems. I reluctantly signed to get the cash. I had a mortgage and other issues. Chairman countersigned. After I signed I was given another document to accept salary for Jog Group RI.14 ksh 144, 292.00 basic. I was told I would not get even the other cash I had received if I did not sign. They took the two documents. I asked for a copy. They photocopied the ones I had signed." That second document the claimant signed on 31.10.2019 stated thus, "I, dr Johnson Kazungu, hereby accept the position of Chief Research Officer (CRO) effective 1st November 2019 as per the remuneration package being Basic Salary for Job Group RI.14 amounting to ksh 144, 920.00 plus other allowances associated with the position as per KMFRI Terms and Conditions of Service as approved by the Board of Management."

21. The claimant testified as follows,

> "'The document I initially signed on 31.10.2019 referred to contract of 01.07.2014 to 31.10.2019. I was on 31.10.2019 on permanent and pensionable terms. Chairman was present. The Attorney General was represented at the meeting. I did not think seriously about the composition of the Board members present on 31.10.2019. I have no contract I signed running from 01.11.2019. I am serving on the Permanent and Pensionable terms. I did not receive the cash I signed for. I went to medical leave. I was told cash would be deposited in my account. A month later I got ksh 5, 100, 000.00 and no one has ever explained to me the difference...."

22. The claimant's other grievance relates to unremitted contributory pension dues. His pleaded case and as per his testimony and documents on record is as follows. Under the letter dated 01.07.2014 the claimant was appointed to the position of CRO and the respondent was expected to remit 22.5% of basic salary to the pension scheme at the ratio of employer: employee being 15%:7.5% but the respondent failed to do so. By the letter dated 25.11.2014 the respondent stated that the claimant was not entitled as he did not qualify to join the pension scheme since he had only 9 years left before attaining the retirement age. The letter stated that only employees with more than 10 years of service would qualify to join the pension scheme. The claimant wrote complaining to the respondent and for 4 years his grievance on the due pension to be contributed was not addressed. Subsequently the respondent by the letter dated 28.05.2018 reinstated the claimant's withheld pension contributions of ksh 1, 149, 393.60 for November 2014 to April 2018. It is the claimant's case that the amount paid by the respondent as withheld pension contributions did not cater for the loss of investment returns from the unremitted pension contributions and he complained to the respondent's CEO and the Retirement Benefits Authority (RBA) by the letter dated 02.09.2018. By letter dated 08.02.2019

RBA advised the respondent that the amount of ksh 1, 149, 393.60 remitted by the respondent should be paid with interest to cover the benefits that ought to have accrued on the claimant's pension benefits for November, 2014 to April 2018. By the letter dated 03.05.2019 the respondent's Board of Trustees, Staff Pension Scheme requested mr Jason Makali from MINET to use the withheld contributions of ksh 1, 149, 393.60 as a basis to calculate the compensation due to loss of income from the claimant's unremitted pension contributions. MINET arrived at ksh 180, 887.60 as compensation due to the claimant but MINET gave no breakdown or formula used to arrive at the figure. Further, the Secretary of the Board of Trustees wrote to the respondent's Director on 25.09.2019 requesting payment of ksh 180, 887.60 to the pension scheme. By the letter dated 03.04.2020 the respondent informed the claimant that it had processed the payment of his pension interest on 02.04.2020 through cheque no 055882 but it is the claimant's case that he has not received evidence that indeed the ksh 180, 887.60 was paid by the respondent to the pension scheme.

23. The claimant's case is that the respondent ought to have based the pension contributions on the claimant's CEO exit salary of ksh 320, 000.00 per month and not ksh 144, 928.00 per month. It is his case that he did not know the basis of the calculation for his withheld pension and compensation thereof was done.

24. The claimant's other grievance relates to underpayments in view of general salary increment for all respondent's staff by the Salaries and Remuneration Commission (SRC) in exercise of its constitutional power under Article 230(4) of the *Constitution* of Kenya, 2010 to set and review remuneration and benefits of state officers and public officers. His case is that by the letter dated 04.09.2019 by CEO of the SRC, the respondent was advised that its salary structure had been revised and the respondent was directed to implement the salary readjustment in two phases effective 01.07.2019 and then 01.07.2020. It is the claimant's case that from August 2016 to June 2019 his salary was ksh 144, 928.00; commuter allowance of ksh 16, 000.00; house allowance of 50, 000.00 and medical allowance of ksh 2, 490.00 summing to ksh 213, 418.00 per month and the total underpayment was ksh 9, 011, 376.00 (ksh 486, 490 – 213, 418.00 per month). His further case is that if his CEO exit salary of ksh 213, 118.00 had been reinstated accordingly, it would have been readjusted to ksh 321, 504.00 and in absence of such revision or readjustment his CEO salary from July 2019 to June 2020 ought to have been basic salary ksh 321, 504.00; house allowance ksh 80,000.00; medical allowance ksh 2, 490.00; commuter allowance of ksh 24, 000.00 and other remunerative allowances ksh 60, 000.00 making ksh 487, 994.00 and underpayment for the period 01.07.2019 to June 2020 was ksh 3, 294, 912.00 (ksh 487, 994 – 213, 418 per month). The SRC guidelines raised CEO salary to ksh 421, 998.00 effective 01.07. 2020 and the claimant's case is that his monthly exit CEO salary adjusted to basic of ksh 421, 998.00; house allowance ksh 80,000.00; medical allowance ksh 2, 490.00; commuter allowance of ksh 24, 000.00 and other remunerative allowances ksh 60, 000.00 making ksh 579, 488.00 and a total underpayment of ksh 2, 196, 420.00 (ksh 579, 488.00 – ksh 213, 418.00 per month).

25. The claimant pleads that he had a legitimate expectation that the total cumulative salary arrears due to him would be paid per his right to fair remuneration under Article 41 (2) of the *Constitution* of Kenya, 2010 as read with the *Employment Act*, cap 226 that prohibits withholding of an employee's salary without just and fair or reasonable cause, and according to judicial precedent by the Employment and Labour Relations Court. He claimed the salary arrears at as follows:

    a. 01.07.2014 to July 2015 ksh 1, 404, 000.00.

    b. 01.08.2015 to July 2016 ksh 3, 396, 864.00.

    c. 01.08.2016 to June 2019 ksh 9, 011, 376.00.

    d. 01.07.2019 to June 2020 ksh 3, 294, 912.00.

e. 01.07.2020 to December 2020 ksh 2, 196, 420.00.

f. Balance of ksh 3, 828, 672 from the payment of ksh 8, 928, 672.00 that the claimant was forced to sign for at the meeting of 31.10.2019.

g. Total claim ksh 23, 132, 244.00.

26. The claimant further grievance relates to violation of his constitutional rights and freedoms. It is pleaded for him that the respondent's conduct and actions amounted to a violation of this constitutional and fundamental rights and freedoms being unfair labour practice contrary to Article 41 (1) and (2) (a); breach of the claimant's right to fair administrative action contrary to Article 47; breach of the claimant's right to dignity contrary to Article 28 of the *Constitution* of Kenya, 2010; and unfair treatment of an employee and former CEO continuing in employment in the Institute under the *Employment Act*, cap 226 and under the common law principle and principles of equity and fundamental justice. The particulars of violation of the claimant's constitutional rights and freedoms were pleaded as follows:

a. The respondent's unilateral withdrawal of the CEO's terms of service personal the claimant when he reverted to position of CRO as appointed by the respondent's Board was without consultation per section 10 (5) of the *Employment Act*, cap 226. The respondent ought to have ensured procedural fairness by consulting the claimant prior to revision of his salary it was an administrative action or decision which adversely affected the claimant's remuneration. Accordingly, the claimant's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair as per Article 47(1) of the *Constitution* of Kenya, 2010 was violated as coupled with a blatant breach of the *Employment Act*.

b. The claimant relied on the decision by Wasilwa J in *Republic v Chief of Staff & Head of Public Service & 2 Others Ex-parte George A.O. Magoha* [2018] eKLR and urged that the respondent ought to have reinstated the claimant's CEO exit salary scale package in accordance with the Board's resolution of 08.12.2011. By such failure it was urged that the respondent had violated the claimant's right to fair labour practice under Article 41 of the *Constitution* coupled with a blatant breach of the *Employment Act* through arbitrary denial of fair and earned remuneration.

c. It was pleaded for him that the respondent placed the claimant on a monthly salary of ksh 144, 920.00 per month which was 50% less than his entitled CEO salary thereby violating his right to human dignity under Article 28 of the *Constitution* of Kenya 2010 and further degrading the claimant to a financial position of a very junior officer of which the claimant was not. The respondent failed to acknowledge that the claimant had risen through the ranks over the years and had brought to the benefit of the respondent a number of donor funded projects and the unfair treatment was such an insult to the claimant's reputation deserving reparation.

d. It was further pleaded that on 31.10.2019 the respondent intimidated the claimant into signing for ksh 8, 928, 672.00 as final settlement of his salary arrears without any reason, justification or basis and it was arbitrary contrary to Article 24 (1) of the *Constitution* that a right or fundamental freedom shall not be limited except by law. The respondent did not provide a written explanation or particulars of the payment as required under the *Employment Act* and the payment was based upon non-existent or imaginary adjustment of the claimant's contract and terms of service.

e. The claimant's Advocates addressed to the respondent the letters dated 07.01.2020 and 19.02.2020 about the injustices to the claimant and drawing the respondent's attention to the

decision by Wasilwa J in *Republic v Chief of Staff & Head of Public Service & 2 Others Ex-parte George A.O. Magoha* [2018] eKLR and by a letter dated 03.04.2020 the respondent denied the demand. By letter dated 24.04.2020 the Advocates addressed the respondents that the claimant was aware of the advisory by the Honourable Attorney General conveyed by the letter ref no AG/CONF/21/75/3VOL.I dated 25.06.2019 (issued per Article 156 of the *Constitution*) and the letter was copied to the Attorney General, Honourable P Kihara Kariuki. Nevertheless, the respondent failed to resolve the claimant's grievances.

27 The claimant pleaded that by the letter dated 06.03.2020 duly exhibited, the claimant was informed that due to his experience and understanding on Fisheries Research and Management issues, he was being deployed to the office of the Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries and Co-operatives with effect from 01.05.2020. That was at the time the COVID-19 pandemic was ravaging the whole world and the Government of Kenya through the Ministry of Interior and Coordination of National Government had imposed a curfew with no movement out of and into counties of Nairobi and Mombasa and an embargo had been ordered on persons over 58 years of age like the claimant to work from home and not to travel willy-nilly. Section 10(5) of the *Employment Act* required the respondent to consult the claimant on such changes in his contract of service prior to such deployment decision but that was never done. Further, the deployment letter was neither followed by nor resulted from any resolution of the respondent's Board. It is urged that the deployment could only be lawfully and procedurally done through the Public Service Commission in an open and accountable and fair consultation with the respondent and the office of the Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries and Co-operatives as well as the claimant. The deployment is stated to have been irregular and unfairly terminated the claimant's contract of service with the respondent.

28. The claimant further pleaded that on 13.10.2020 he received information from someone at the Institute that the respondent issued a payment of ksh 2, 008, 951.00 to the claimant's Retirement Benefits Scheme. The claimant does not know whatever the payment was for because section 20 and 21 of the *Employment Act* required the respondent to give the claimant a written statement to the claimant at or before the time at which any payment of wages or salary is made to the employee but the claimant had not received such statement.

29. Further, it is pleaded that in April 2020 the claimant's Advocates had already served the demand for payment of the withheld salary arrears and reinstatement of his CEO exit salary and the respondent under connivance and direction of the Principal Secretary, State Department of Fisheries and the respondent's Director, the claimant's salary was unilaterally withheld in breach of the provisions of the *Employment Act* and the claimant was subjected to extreme mental torture and anguish and financial hardship leading to the deterioration of the claimant's health which the respondent had been notified about. The respondent had also denied the claimant access to the group insurance health cover in 2020. Section 17 of the Act required the respondent as employer to pay the entire amount of wages earned by or payable to the claimant as the employee in pursuance of the contract of service but, the respondent breached the contract and the section by withholding the claimant's salary from April, 2020.

30. It is further pleaded for the claimant as follows:

> "43. Under section 25 of the *Employment Act* an employer who contravenes the provisions of Part IV of the Act (Protection of Wages) commits an offence and is liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding two years or to both and is required to repay any remuneration wrongfully withheld or wrongfully deducted from the employee. The respondent is liable to pay the fine imposed by the

Employment Act for wrongfully withholding the claimant's remuneration for April – November 2020 and for the underpayments for 1st July, 2014 – November, 2020 and to pay the withheld salary and attendant allowances.

44. The claimant avers that the Respondent's letter of 12th November, 2020 accusing him of being absent from work was unbefitting since the Respondent was well aware of the Claimant's deteriorating health through the claimant's letter of 28th October, 2019 and his doctor's letter of 16th October, 2019.

45. The claimant further avers that the Respondent created an intolerable work environment through the unjust salary reductions, failure to reinstate his CEO exit salary, non-payment of all salary arrears due to him, the irregular deployment and accusations of absenteeism despite COVID-19 pandemic restrictions announced by the Government at no lower level than by His Excellency the President directing persons over the age of 58 years like the Claimant to work from home; all of which were calculated at frustrating the claimant and force him into resignation. The respondent thus deliberately created circumstances that amount to constructive dismissal of an employee and which are inhuman and degrading treatment verging on servitude."

31. The final submissions were filed for the parties. The Court has considered the memorandum of claim, the documents exhibited for the claimant, the claimant's oral testimony in Court, and the parties' respective final submissions. The Court makes pertinent findings as follows.

32. To answer the 1st issue for determination, the Court returns that the parties are in a continuing contract of service. The evidence is that the claimant has been in the respondent's unbroken service since 1980 as per the letter of initial appointment dated 01.11.1980. The claimant had a clean record of service and he was promoted through the ranks as pleaded. He was ultimately appointed the Director or CEO initially on Permanent and Pensionable terms of service which later translated to renewable term contracts per the prevailing Government policies governing service by CEOs of state corporations and as pleaded and established for the claimant. The Court finds that the last of such term contracts served by the claimant lapsed on 30.06.2014 and the claimant was appointed by reversion to the position of CRO with salary scale of the position of CEO personal to himself per the Board resolution4.2.2.2 and 4.2.2.3. The resolution was that a CEO reverting to the position of CRO would, "...retain salaries personal to themselves." The Board did not refer to basic salary or gross salary. Parties appear not to have submitted extensively on the distinction as to whether the Board resolution meant basic or gross pay. However, it is urged for the claimant that the resolution meant gross salary (basic monthly salary plus the allowances for CEO scale) and as per the computation in the memorandum of claim and based on the exhibited claimant's payslip of 30.06.2014 showing his gross pay of ksh 462, 490.00 as opposed to the impugned pay when he reverted to CRO of a gross pay of ksh 378, 490.00 dated 31.07.2014.

33. In resolving the issue of the effect of the resolution by the Board and meaning of "...retain salaries personal to themselves," the Court finds that the meaning assigned by the claimant that he reverted to CRO with the gross salary of CEO personal to himself is upheld (inclusive of due allowances). First, the respondent has not by pleadings or submissions objected to the claimant's interpretation. Second, the Board resolution did not refer to "basic salary" and nothing stopped the Board from making such clarity if it was desired and intended to do so. Third, Part V of the *Employment Act* provides for Rights and Duties in Employment. Section 26 (2) under the said Part V provides thus, "(2) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment

award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply." The Court will therefore construe the more favourable effect of "salary" in the Board resolution to mean "gross salary" as urged for the claimant – meaning the monthly basic salary plus the relevant remunerative monthly allowances as urged for the claimant being house allowance, medical allowance, and responsibility allowance and which the Court considers to be within the rights and responsibilities in employment under Part V of the Act attaching to hours of work, housing, and medical attention.

34. The Court of appeal considered the issue of the meaning of remuneration, gross salary or wage, basic salary or wage, and allowances in *The Postal Corporation of Kenya v Andrew K. Tanui* [2019]eKLR (Waki, Musinga & Kiage JJ.A) and held as follows:

> " The third ground urged is whether the respondent was entitled to payment of allowances as part of the award. It arises from the award of compensation of 12 months at the rate of the gross monthly salary of ksh 355,500, which, according to the appellant, ought to be limited to the basic salary of ksh 217,000. In counsel's submission, an allowance is not earned by the employee but is a financial benefit given to the employee by the employer over and above the regular salary. In other words, it is an expense an employer accepts to incur to facilitate the employee's performance of his duties, and is only payable up to the point of termination, not beyond it. The only exception, in his submission, was house allowance which under Section 31 (1) of the *Employment Act* was obligatory in addition to the basic salary.

35. To drive the point home, counsel referred us to Section 3 of the *Employment Act* which defines remuneration, as 'the total value of all payments in money or kind, made or owing to an employee arising from the employment of that employee'; Section 18 (4) which provides for payment of 'all moneys, allowances and benefits' to a dismissed employee; and Section 49 (1) (c) which refers to payment of "wages or salary not exceeding twelve months based on the gross monthly wage or salary" as compensation. Counsel observed that the use of different terminology in those provisions confirmed that 'gross monthly wage or salary' is not inclusive of all allowances. In support of the submission, counsel relied on the High Court case of *Edward Muthuri v Airfreight Forwarders Ltd* [2007] eKLR (O. K. Mutungi, J.); and the Industrial Court decisions in *David Nyagudi Okoth & another v Corn Products Kenya Limited & another* [2014] eKLR) and *Fredrick Ngari Muchira and 99 Others v Pyrethrum Board of Kenya* [2013] eKLR, (B. Ongaya, J); all to the effect that allowances are not part of gross wages. On that premise, and assuming that the compensation of 12 months was tenable, it could only amount to ksh 2,604,000 and not ksh 4,266,000, as the trial court found, concluded counsel.

36. In a brief response, ms Guserwa supported the trial court, submitting that Section 49 (1) (c) of the Act and Section 15 of the *Labour Institutions Act*, 2007 (now repealed) provided for the remedy to be based on the monthly gross salary which, in her view, does not exclude allowances.

37. We have anxiously considered the issue, for it is not without difficulty. As correctly submitted by learned counsel for the appellant, the definitions of 'wages' and 'allowances' are different and they are not interchangeable. Indeed, two learned Judges O. K. Mutungi, J. and B. Ongaya, J. in the authorities cited before us were of the view that 'gross wages' or 'gross salary' was exclusive of allowances. As also correctly observed by counsel, there is no definition of 'gross wages' or 'gross salary' in the *Employment Act*, 2007. The only definition is on "remuneration" which is the 'total value of all payments in money or in kind, made or owing to an employee arising from employment of that employee'. The Act, nevertheless, uses the terminology 'wages' and 'salary' interchangeably in Part IV of the Act -- Sections 17 to 25. In Section 18, it refers to 'wages' and 'allowances' as separate payments upon termination

of employment. But in prescribing the manner of payment of wages and salaries in Section 20, the terminology 'gross wages' is employed for the first time in the Act. The section provides:

> " 20. Itemised pay statement
>
> (1) An employer shall give a written statement to an employee at or before the time at which any payment of wages or salary is made to the employee.
>
> (2) The statement specified in subsection (1) shall contain particulars of -
>
> (a) the gross amount of the wages or salary of the employee;
>
> (b) the amounts of any variable and subject to section 22, any statutory deductions from that gross amount and the purposes for which they are made; and
>
> (c) where different parts of the net amount are paid in different ways, the amount and method of payment of each part-payment". [Emphasis added].

38. So that, reference to 'wages', 'allowances', 'gross wages' or 'gross salary' are all separate elements of the remuneration of an employee. Our interest in this case is 'gross monthly wage or salary' which is the terminology used in the Act as the remedy of compensation for unfair termination. In the case of *Banking, Insurance & Finance Union (Kenya) v Maisha Bora Sacco Society Ltd* [2018] eKLR, decided on 20th December, 2018, Ongaya, J. adopted the following construction:

> " Section 49 (1) (c) provides that the employee may be paid, "(c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal." The Act does not define the meaning of "gross salary". *The Black's Law Dictionary*, 9th Edition defines "gross income" as total income from all sources before deductions, exemptions or other tax reductions. Thus the court returns(sic) that "gross salary" under the section means the monthly basic salary and allowances as per the contract of service and therefore the 15% monthly house allowance that was found due under the relevant wage order was part of the gross monthly salary that was due. Thus, in computing the 3 months' gross salaries awarded in compensation, the 15% house allowance will be construed accordingly. The Court returns(sic) that the gross salary under the section does not mean the last gross monthly salary actually paid but the last gross monthly salary or wage as per the contract of service. .....In conclusion, the Court returns (sic) that "gross salary" in section 49 of the Act means the gross monthly salary per the contract of service and the 15% of basic pay in house allowance as awarded will be reckoned as part of the grievants' gross monthly salary as at the time of termination because the Court found that it was part of their due regular payment under their respective minimum terms and conditions of service." [Emphasis added].

39. It is apparent at once, that the learned Judge had changed his view expressed in the decisions made four years earlier in the two cases cited above. In our view, his construction in the latter case that 'gross monthly wages' are inclusive of allowances resonates with common sense. In common parlance,

basic salary is the base income of an individual, the fixed part of one's compensation package; while an allowance is the amount received by the employee for meeting service requirements. It is provided in addition to the basic salary and varies from employer to employer. Some employers may well offer allowances that are clearly predicated on actual performance of the contract but which do not form part of the gross salary of an employee. Good examples were given in the case of *Pravin Bowry v Ethics & Anti-Corruption Commission* [2013] eKLR, such as 'telephone allowance; provision of security guards; provision of fuel; cost of medical premium and annual insurance; amounts due for outpatient and medicines; amount in lieu of leave; proportionate AAR premiums for Claimant's wife; cost of AAR cover for the unspent term of contract'. The exclusion of such allowances was affirmed by this Court in the case of *Richard Erskine Leakey & 2 others v Samson Kipkoech Chemai* [2019] eKLR, which stated thus:

> " 55. In our view, there are certain allowances that are dependent on actual performance of the contract of employment. When calculating damages due to an employee in the event of unfair or wrongful termination, it is only the emoluments or gross salary of the employee that should be taken into account not allowances and privileges dependent on actual service and performance of the contract.

40. Gross salary would then be the amount calculated by adding up one's basic salary and allowances, before deduction of taxes and other deductions. Each case must be examined to identify the nature of the allowances given and whether they form part of the gross salary. We affirm the construction made by Ongaya, J. in the *Banking, Insurance & Finance Union* case (*supra*). We are not persuaded by the appellant's argument that 'gross wages' or 'gross salary' does not include any allowances and that it is the same as the 'basic salary' or 'basic wages'."

41. The Court has extensively reproduced the binding guidance of the Court of Appeal in this rather tricky issue of definition and which the Court of Appeal found to be not without difficulty. There is no doubt that the claimant's monthly remunerative basic salary and allowances were as per his payslip dated 13.06.2014 and in absence of any other material, the Court returns that it was that gross monthly remuneration (basic pay and allowances) that the Board sought to protect when it resolved that a CEO whose contract of service was not renewed would revert to the position of CRO but would "...retain salaries personal to themselves." The Court finds accordingly and further finds that the Acting Director dr Renison K Ruwa PhD in writing to emplace the claimant by reversion to the position of CRO effective 01.07.2014 correctly conveyed the basic salary of ksh 320, 000.00 but in error and contrary to Board decision further conveyed, "Your house allowance and other allowances will be pegged to the position of Chief Research Officer, as stipulated in the KMFR Terms and Conditions of Service." The Court finds that nowhere did the Board resolution vary the monthly remunerative payment inclusive the attached perks of the claimant as he reverted to the position of CRO and the Acting Director thereby acted outside the Board's resolution in purporting to vary the claimant's CEO remunerative allowances and which the Board had resolved he would enjoy when emplaced to CRO position - and as already found by the Court. The Court finds that the Acting Director was obligated to convey the claimant's terms of service upon reverting to CRO from CEO strictly in accordance with the Board's resolution and the claimant has established that he was entitled to the remunerative salary as claimed, the CEO's monthly basic pay plus allowances. The Court considers that the Board's intention was that a CEO reverting from that position to CRO position retains the accrued monthly remuneration (basic pay and allowances) so that such an officer does not suffer deteriorating financial status in that regard.

42. For avoidance of doubt, the Circular ref no OP/SCAC.1/12(11) dated 14.05.2015 was clear that the mischief it set out to curb was to prevent CEOs who reverted to teaching or research positions

from enjoying CEO's perks and the Board's resolution must therefore be understood as declaring the prevailing government policy at the time the resolution was made - that a CEO like the claimant in reverting to a lower position would nevertheless retain the CEO's salary and perks (allowances). The mischief the said circular set out to curb was expressed thus, "(c) Retaining the perks attached to the positions of CEOs in the above circumstances would be inordinately expensive and unsustainable to the affected institutions.

43. It is required that all State Corporations should ensure that staff in their employment only enjoy remuneration and privileges that fall within regular terms and conditions of service commensurate to their substantive appointment and grade. More specifically, staff in Research Institutions and Public Universities who retire as Chief Executive Officers but opt to revert to research/teaching roles when their tour of duty as CEOs lapse, should be required to adopt the perks attached to the newly assigned lower grade." The Court has therefore found that the Board's resolution in the instant case was made consistent with and to uphold the prevailing Government policy at the time and which was that an officer reverting from CEO to a research role (such as to CRO like the claimant did) would retain the CEO's basic salary and perks or remunerative allowances.

44. To answer the 2nd issue for determination, the Court returns that as per the advisory by the Honourable Attorney General conveyed by the letter ref no AG/CONF/21/75/3VOL.I dated 25.06.2019 (issued per Article 156 of the *Constitution*) and as per the decision by Wasilwa J in *Republic v Chief of Staff & Head of Public Service & 2 Others Ex-parte George A.O. Magoha* [2018] eKLR, the claimant has established that he was entitled to the CEO exit salary package as pleaded and submitted for the claimant. The Court upholds the advisory opinion by the Attorney General and the holding by Wasilwa J - and which fully apply as pleaded and submitted for the claimant. The Court has reconsidered the respondent's submissions and nowhere is the issue specifically addressed or rebutted in view of the claimant's pleaded case, evidence and submissions. Without belabouring the point, the Court returns that the findings by Wasilwa J in *Republic v Chief of Staff & Head of Public Service & 2 Others Ex-parte George A.O. Magoha* [2018] eKLR, are upheld as wholly applying to the claimant's case including that the circular ref no OP/SCAC.1/12(11) dated 14.05.2015 could not apply retrospectively to adversely vary the accrued and vested claimant's terms and conditions of service following his reverting from the CEO position and being emplaced in the position of CRO effective 01.07.2014.

45. To answer the 3rd issue for determination, the Court returns that the two documents signed by the parties on 31.10.2019 did not impair or terminate the claimant's contract of service reverting him to the position of CRO effective 01.07.2014 and upon salary of the CEO as per the Board resolutions 4.2.2.2 and 4.2.2.3 per the minutes of the 71st session of the Board meeting held on 08.12.2011. The claimant testified that as at the hearing of the suit on 10.03.2022 he was serving on Permanent and Pensionable terms of service and that he was due to retire. He testified thus, "Over the period I have been unwell and frustrated. The respondent has declined amicable settlement. I contributed a lot to the Institute. I have worked for 42 years and am retiring this year." Further, by the letter ref no KMF/CON/PER/108 VOL.II/28 dated 06.03.2020 the respondent purported to deploy the claimant to the office of the Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries and Cooperatives effective 01.05.2020. Further, by the letter ref no KMF/CON/PER/108 VOL.II/79 dated 12.11.2020 the respondent purported to impose a severe warning against the claimant on account of alleged absenteeism and failure to submit balance score card report. By that cumulative evidence, the Court returns that after the claimant and the respondent's Board Chairman signed the two documents on 31.10.2019, the parties nevertheless continued in a contract of service.

46. As per the claimant's evidence, pleading and submissions, there exited no contract of service between the parties and which was referred to in one of the documents thus, "...arrears for the contract dated 1st July 2014 to 31st October 2019." Further, the claimant had already been emplaced on the position of CRO with salary personal to himself as per the Board resolutions 4.2.2.2 and 4.2.2.3 per the minutes of the 71st session of the Board meeting held on 08.12.2011. There was no Board resolution exhibited in Court to support the conclusion of the second document the claimant and the Board Chairman signed on 31.10.2019 purporting to be an acceptance by the claimant of the position of CRO effective 01.11.2019 per basic salary for Job Group RI.14 of ksh 144, 920.00 plus allowances associated with the position as per respondent's Terms and Conditions of Service as approved by the Board of Management – and with the endorsement, "This is final settlement on this matter and there will be no further claims on this matter." The Court finds that the endorsement served no practical purpose as the claimant had no grievance about being emplaced on the position of CRO as a final settlement in that regard had long before 31.10.2019 been arrived at and concluded effective 01.07.2014 when the claimant reverted to the position of CRO from that of CEO. The only grievance had been payment of the salary personal to the claimant. The Court finds that the purported emplacement as CRO per the second document was superfluous and the terms of payment therein fictitious for want of the relevant Board resolution and which was never exhibited as being implemented by that second document the claimant and the Board Chairman had signed.

47. The Court finds that the first document was signed in error that there was a contract between the parties dated 01.07.2014 to 31.10.2019 from which the claimant was exiting. The Court finds that the same amounted to a mistake at the time the parties signed in erroneous belief that such contract existed but which in fact did not – the only contract being the one effective 01.07.2014 and which was subsisting as at 31.10.2019 and continuing to so run as it had never been terminated by either of the parties. The evidence is that as at 31.10.2019 the claimant had a long standing grievance of the unpaid salary of CEO personal to himself and effective 01.07.2014. The Court will read down that first document the parties signed to the extent that parties agreed to partly settle the claimant's claims of unpaid due salary personal to himself as a valid part of the document – that being the equitable remedy in view of the evidence and the intention of the parties that the claimant had a valid grievance to be paid the outstanding salary personal to himself.

48. As for the second document the parties signed on 31.10.2019, the Court has found that the same appears was signed in the parties' common mistake about the subject matter of the agreement that the claimant's contract of service emplacing him to the position of CRO had lapsed or ended or, that the claimant needed to be so emplaced again but without there having been termination of the contract of service running from 01.07.2014 and which was subsisting. The parties signed the second document apparently holding a similar misguided belief and mistake of fact that their subsisting contract of service running from 01.07.2014 was apparently no longer in place but which was not the true position. The Court therefore finds that the second document amounted to nothing but a void contract because there is sufficient evidence to show that the mistake was satisfactorily fundamental to render the document's identity different from the true terms of the contract of service that was subsisting between the parties effective 01.07.2014.

49. It was submitted for the respondent that there was no duress and that the claimant voluntarily signed the two documents. While indeed the claimant did not show physical duress, he established economic duress because as at the time the two documents were signed he had a personal financial pressure requiring that he gets paid so as to proceed for medical treatment as his health was deteriorating. The claimant testified thus, "...One member told me to simply sign so I get assistance in view of my health issues. Chairman told me to sign because I had gone through problems. I reluctantly signed to get

the cash. I had mortgage and other issues..." Be it as it may, the Court has found the parties signed the two documents under mistake and economic duress and the Court's further findings that the first document is avoidable at the claimant's instance except to the extent that the respondent paid the partly owed salaries, while, the 2nd document is void and therefore null in view of the common mistake as blended with the economic duress prevailing at the time of the signing.

50. The 4th issue for determination is whether in the instant case there exits unfair and constructive termination. It is submitted for the claimant that by the letter dated 06.03.2020 the claimant was deployed to the office of the Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries and Cooperatives effective 01.05.2020. Further, the deployment was not lawful and procedural because the claimant was not consulted per section 10(5) of the *Employment Act*. Further, the Public Service Commission and the Cabinet Secretary had not been consulted at all. It was also a setup for the claimant not to move as deployed in view of the imposed lock-down due to movement restrictions flowing from the COVID-19 pandemic. The letter of 12. 11.2020 then accused the claimant of absenteeism yet the respondent knew about the claimant's deteriorating health and the requirement under the COVID-19 protocol that persons over 58 years of age like the claimant were required to stay and work from home. It was submitted that the respondent's conduct (by assigning the claimant in a manner it was impossible for the claimant to perform as engaged) be deemed to have amounted to a fundamental repudiatory breach of the contract of employment (and therefore unfair constructive termination) as was held by the Court of Appeal in *Coca Cola East & Central Africa Limitedv Maria Kagai Ligaga* [2015] eKLR. It was submitted that the respondent created an intolerable work environment through:

    a. Unjust salary reductions and failure to reinstate the claimant's CEO exit salary package despite being cognizant of the position in law.

    b. Failure to pay the due arrears of the CEO exit salaries from 01.07.2014 to 31.12.2020.

    c. Withholding the claimant's salary for April – November 2020 and denial of access to respondent's group medical insurance cover during that period.

    d. The irregular deployment to the office of the Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries and Cooperatives effective 01.05.2020.

    e. Accusations of absenteeism despite COVID-19 pandemic restrictions and the Government directive that persons above 58 years of age work from home.

51. It was submitted that the respondent's intolerable conduct and actions were calculated at frustrating the claimant and forcing him into resignation but, the claimant did not. It was submitted that in view of the unfair constructive termination the claimant be compensated at 12-months x ksh 486, 490.00, the prevailing monthly salary.

52. For the respondent it was submitted that under *Black's Law Dictionary* (Tenth Edition) constructive dismissal or discharge means, "An employer's creation of working conditions that leave a particular employee or group of employees little or no choice but to resign, as by fundamentally changing the working conditions or terms of employment; an employer's course of action that, being detrimental to an employee leaves the employee almost no option but to quit." It was further submitted that the Court of Appeal in *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR held that the basic ingredients of constructive dismissal to be considered in toto are as follows:

    a. the employer must be in breach of the contract of employment;

    b. the breach must be fundamental as to be considered a repudiatory breach;

c. the employee must resign in response to that breach; and,

d. the employee must not delay in resigning after the breach has taken place, otherwise the Court may find the breach waived.

53. The respondent also cited *Western Excavating ECC Ltd v Sharp* (1978) 2 WLR 344 where Lord Denning held, "Where the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

54. It was therefore submitted for the respondent that the claimant had remained in the respondent's employment ever since he reverted to CRO position from that of CEO effective 01.07.2014 and the dispute had persisted. It was submitted that the claimant had not resigned from the employment and, the Court has already found that by the claimant's own evidence, he was still in the respondent's employment. The Court therefore finds that as submitted for the respondent (and despite the claimant establishing the respondent's intolerable conduct as pleaded), the claimant's continued employment had amounted to affirmation of the contract of service. There being no established unfair constructive termination or unfair termination at all, the Court finds that the claimant has failed to establish the justification for grant of 12 months' compensation on account of constructive termination.

55. While making that finding, the Court has considered the following unquestionable material which show that indeed the parties are still in a contract of service throughout the material time and even as at the hearing of the case on 10.03.2022:

a. The claimant testified that as at 10.03.2022 he had 3 months to his retirement date.

b. The claimant's advocates wrote to the respondent a letter ref no SSM/JK/160/LIT dated07.01.2020 and in part stated, "We further DEMAND that the institute do respect the rule of law and to immediately restore and implement dr Kazungu's CEO exiting salary and perks, particulars of which are all within the Institute's knowledge and records, with effect from 1st July 2014 as he continues to serve as Chief Research Officer so that he may unreservedly offer the CEO and the institute advice and professional services required of the Chief Research Officer under clause 6.2.9 of the KEMRI Scheme of Service for Research Scientists, an according to the dignity bestowed with Constitution of Kenya, 2010; the apparent unlawful and non-procedural demotion effected on 31st October, 2019 has grossly violated the right to dignity."

c. The claimant's advocates wrote to the respondent a letter ref no SSM/JK/160/LIT dated 19.02.2020 and in part demanding the cumulative outstanding salary as at 31.01.2020 at ksh 16, 269, 888.00 and further stating, "We also demand that you update your records to reflect dr Kazungu's monthly earning as ksh 486, 490.00/= in accordance with his exit package and forward detailed evidence of the same to us."

d. The claimant's advocates further wrote to the respondent a letter ref no SSM/JK/160/LIT dated 24.04.2020 and in part stated that the deployment of the claimant to the office of the Cabinet Secretary per the letter dated 06.03.2020 was irregular and such deployment would require establishment of the office the claimant would be so deployed to per Article 234(2) (a) (i); and the claimant be appointed thereto by the Public Service Commission per Article 234(2) (a) (ii) of the *Constitution*.

e. By the letter ref no KMF/CONF/PER/108 VOL.II/79 dated 12.11.2020 the respondent purported to impose upon the claimant a severe warning on account of alleged absenteeism and alleged failure to submit a balance score card report; the effect being that as at 12.11.2020, the claimant was in the respondent's employment.

56. Thus, the Court finds that the parties have continued in employee-employer relationship and there is no basis for a finding of unfair constructive termination. The Court upholds the respondent's submissions in that regard. The Court further returns that in view of the continuing employment relationship, the claimant has established a case for a declaration that he is entitled to continued payment of his due CEO monthly remuneration at the rate of ksh 579,488.00 (as duly adjusted by the SRC resolution) and effective for January 2021until the due date of his retirement and any outstanding amounts thereof to be computed and included in the final decree. In making that award the Court has considered that the claimant has prayed for any other relief the Court deems fit and just to grant. The Claimant has also established that his right to fair remuneration has been infringed and continues to be violated contrary to Article 41 (2) (a) of the *Constitution* and provisions of the *Employment Act* on payment of due remuneration as cited for the claimant. The Court finds that the constitutional and statutory right continues to be violated as urged for the claimant as he looks forward to honourable retirement without being hounded out of office or humiliated after such long clean service with great milestones. The injury should otherwise not go without due redress.

57. To answer the 5th issue for determination the Court returns that the claimant has by his testimony established the breach of fundamental rights and freedoms as pleaded and as submitted for him. First, on the basis of the upheld decision by Wasilwa J in *Republic v Chief of Staff & Head of Public Service & 2 Others Ex-parte George A.O. Magoha* [2018] eKLR, the Court returns that as submitted for the claimant, the respondent violated the claimant's right to fair administrative action by failing to accord him a hearing or consultation prior to revision of his salary in August 2015. The right was also violated when the claimant was invited to sign the two documents on 31.10.2019 without prior hearing and consultation as the signing amounted to unreasonableness – and reasons were not given at all - and no Board resolution was established to have existed with respect to authorising the signing of the two documents on 31.10.2019. The Court finds that in absence of the relevant Board resolution or other reason for signing of the second document on 31.10.2019, the claimant was not given a reason as envisaged in Article 47 of the *Constitution* and as was held by the Supreme Court in *Shollei v Judicial Service Commission & another* [2022]eKLR that the Article requires that a person against whom an administrative action was being taken had a right to be given written reasons for the action if a right or fundamental freedom of that person had been or was likely to be adversely affected by an administrative action. His CEO salary personal to himself was downgraded without being given valid reasons and in disregard of the cited and earlier Court decision by Wasilwa J and as per the Attorney General's binding advisory opinion. The Court has considered the respondent's intolerable conduct set out earlier in this judgment (in urging constructive termination) and finds that the same amounted to the respondent's aggravated violation of the claimant's inherent dignity and right to have that dignity respected and protected. As was held in *Oyatsi v Judicial Service Commission* [2022]eKLR (Nduma J) such persistent and intolerable conduct, actions and omissions by the respondent against the claimant amounted to

degraded human dignity of the claimant in violation of Article 28 of the *Constitution* of Kenya, 2010. The Court further finds that the claimant's right to fair labour practices was violated contrary to Article 41 of the *Constitution*. As submitted for the claimant, the right to fair remuneration was violated when his CEO salary personal to himself was withheld. On 31.10.2019 he was made to sign for a payment without the due statement particularising the payment as required under the cited provisions of the *Employment Act*. As submitted and per the claimant's testimony, despite the claimant's protestation to sign the two documents on 31.10.2019 for want of due explanation and information about the two documents, the information was not provided. Article 35 (b) of the *Constitution* provides that every citizen has the right of access to information held by another person and required for the exercise or protection of any right or fundamental freedom. The Court finds that as submitted, the claimant's protestation on 31.10.2019 went without the relevant information being provided and the right was violated as claimed.

58. As submitted for the claimant in *Peter Wambugu Kariuki & 16 Others v Kenya Agricultural Research Institute* [2013]eKLR the Court held,

> " What is this right to fair labour practices?
>
> First, it is the opinion of the court that the bundle of elements of "fair labour practices" is elaborated in Article 41(2), (3), (4) and (5) of the *Constitution*. Under Article 41(2) every worker has the right to fair remuneration; to reasonable working conditions; to form, join or participate in the activities and programmes of a trade union; and to go on strike. Under Article 41(3) every employer has the right to form and join an employers' organization; and to participate in the activities and programmes of an employers' organization. Under Article 41(4), every trade union and every employers' organization has the right to determine its own administration, programmes and activities; to organize; and to form and join a federation. Under Article 41(5) every trade union, employers' organization and employer has the right to engage in collective bargaining. These constitutional provisions constitute the foundational contents of the right to fair labour practices.

59. Secondly, it is the opinion of the court that the right to "fair labour practices" encompasses the constitutional and statutory provisions and the established work place conventions or usages that give effect to the elaborations set out in Article 41 or promote and protect fairness at work. These include provisions for basic fair treatment of employees, procedures for collective representation at work, and of late, policies that enhance family life while making it easier for men, women and persons with disabilities to go to work."

60. In the instant case, the claimant has established that the respondent engaged in intolerable conduct, acts, and omissions that made it unbearable for the claimant to work comfortably and with due human dignity. It was made difficult for the claimant to proceed as deployed at the parent ministry at the peak of COVID-19 pandemic and lock down. In any event the deployment has been established to have been irregular and unconstitutional for want of involvement of the Public Service Commission in discharge of its constitutional powers and functions. His pension was not only withheld but it was later computed on the down-graded salary and no statement of the computation was delivered to the claimant by the respondent as required under the cited provisions of the *Employment Act*.

61. As submitted for the claimant, the respondent has not established a justification for its violation of the claimant's rights in terms of Article 24(1) of the *Constitution* which provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The claimant has established an aggravating factor that throughout the

persistence of the dispute his health was deteriorating, he was a cancer patient, but the respondent acted most unreasonably and unfairly by withholding his most needed respondent's group medical cover.

62. The Court has considered all the constitutional violations and considers that an award of 12 months' salaries at the claimant's prevailing due CEO's monthly remunerative pay will meet ends of justice as vindication of the gross and aggravated violations of his rights and fundamental freedoms and as due to him under Article 23 (3) (e) of the *Constitution* of Kenya, 2010 as well as he has claimed and prayed for. He is awarded ksh 486, 490 x 12 = ksh 5, 837, 880.00. While making that award, the Court has considered that the respondent made no specific submissions on the relief and established no mitigating factors in favour of the respondent in view of the established violations of constitutional rights and fundamental freedoms.

63. The Court has considered and been guided, as is bound, by the Court of Appeal holding in *Commission on Administrative Justice v Kenya Vision 2030 Delivery Board & 2 others* [2019]eKLR (Nambuye, Kiage & Murgor JJ.A) thus,

> " As for an order for compensation and assessment of the attendant quantum of damages, having ruled above in favour of the 3rd respondent in his claim that his right to a Fair Administrative Action was infringed by the 1st respondent, we issue a declaration that the 3rd respondent's right to a Fair Administrative Action was violated by the 1st respondent.

64. Consequent to the above finding, we now proceed to redress the same. The approach we take is as was stated by the High Court in *Ericson Kenya Limited v Attorney General & 3 others* [2014] eKLR for the holding *inter alia* that:

> " a court of law has a duty after finding in favour of a party under Article 23 of the Kenya *Constitution* 2010 to frame appropriate reliefs to vindicate the rights that may have been infringed and which reliefs are not limited to the specific (reliefs) outlined in Article 23(3) (a) to (e)"

65. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR we observe that the primary purpose of a constitutional remedy is not compensatory or punitive, but it is for purposes of vindicating the rights violated and to prevent or to deter any future infringement. See also *Lucas Omoto Wamari & 2 others* [2017] eKLR for observations *inter alia* that:

> " .... mere declaration without any specific award of damages do not vindicate the appellant. Neither do they convey a derogative message regarding the sanctity of the constitution and the need for protection of fundamental rights and freedoms...."

66. In *Kenya Agricultural Research Institute v Peter Wambugu Kariuki & others* Nakuru Civil Appeal no 315 of 2015, the following observations were made:

> " Our construction of Article 23 of the *Constitution* of Kenya, 2010 is that, it simply makes provisions that where a violation of the guaranteed constitutional rights and fundamental freedom has been established, the court has a wide range of remedies to grant. Among these is payment of monetary compensation. In the instant appeal as already mentioned above, the Judge simply made a pronouncement that the cross-appellant's rights and fundamental

freedom had been violated but made no provisions for an appropriate remedy in line with that finding."

> "We find nothing in the said Article to suggest that a particular relief for the alleged violation must be prayed for before it may be granted. We therefore find that there was jurisdiction for the Judge to grant the reliefs notwithstanding, lack of specific prayer for the particular appropriate remedy."

67. In light of the above, it is our finding that the 3rd respondent is entitled to an award of damages which we now proceed to assess. The comparables for an appropriate award of damages for the established breach are as were set out in *Lucas Omoto Wamari v Attorney General & another* (*supra*) wherein, the Court reviewed the awards granted in *Jennifer Muthoni Njoroge and others v the Attorney General* [2012] eKLR, and *Benedict Munene Kariuki & 13 others v the Attorney General*; High Court Petition no 722 of 2009, wherein, claimants were variously awarded amounts of between ksh 1.5. Million and ksh 2 million for torture, cruel and in human treatment and unlawful detention for periods ranging between seven (7) days to fourteen (14) days."

68. In the instant case the claimant has specifically pleaded and prayed for award of compensation for violation of his rights, though by the Court of Appeal holding, once the violations are established (as already done), then the Court would be required to remedy the same by granting appropriate order under Article 23 (3) of the *Constitution*. The Court has found that the respondent engaged in numerous actions and omissions as already outlined in this judgment and amounting to fundamental breaches that otherwise entitled the claimant to resign upon constructive termination. The Court has found that the claimant failed to resign in view of his long clean service, the desire to uphold the dignity of the high offices he had held and served with the respondent, and, the claimant's keenness to retire from public service honourably. The Court reckons that in the good and loyal service of the respondent, the claimant's blossoming youthfulness had waned and by the respondent's violations, the claimant's otherwise glorious exit from his long colourful public service was under a sustained threat characterised with the claimant's unending anxiety and seriously failing personal healthiness in his old age. The Court has considered that the respondent in breaching the claimant's rights and fundamental freedoms as well as the cited statutory provisions, there were no mitigating factors. The violations remained aggravated as the respondent continued in the violations despite clear biding advisory by the Honourable Attorney General and the binding holdings in a similar decided case as duly brought to the respondent's attention. The Court finds that the violations therefore manifested as a series of unperfected constructive unfair terminations for claimant's unwavering patience and the award of an order for compensation in vindication has been pegged on 12 months' gross salaries as submitted for the claimant.

69. The 6th issue for determination is whether the claimant is entitled to the remedy at ksh 100, 000.00 equivalent to the fine payable under section 25 of the *Employment Act* cap 226 for remuneration wrongfully withheld and wrongfully deducted from the claimant.

70. Section 29 of the *Employment and Labour Relations Court Act* provides for access to justice. The section provides, inter alia, that the Chief Justice may by notice in the Gazette appoint certain magistrates to preside over cases involving employment and labour relations in respect of any area of the country. Further, subject to Article 169(2) (a) of the *Constitution*, the magistrates appointed under the section shall have jurisdiction and power to handle:

    a. disputes relating to offences defined in any Act of Parliament dealing with employment and labour relations; and

b. any other dispute as may be designated in a Gazette notice by the Chief Justice on the advice of the Principal Judge.

71. Pursuant to that provision, by Gazette Notice no 6024 of 22.06.2018 and in consultation with the Principal Judge, the Chief Justice appointed all Magistrates of the rank of Senior Resident Magistrates and above as Special Magistrates designated to hear and determine the following employment and labour relations cases within their respective areas of jurisdiction:

1. Disputes arising from contracts of employment (excluding trade disputes under the *Labour Relations Act*, 2007) where employees gross monthly pay does not exceed ksh 80,000.00 as commenced and continued in accordance with the Employment and Labour Relations Court (Procedure) Rules, 2016.

2. Matters relating to the following specific areas:

i. offences under the *Work Injury Benefits Act*, 2007;

ii. offences under the *Employment Act*, 2007;

iii. offences under the *Labour Institutions Act*, 2007.

iv. Offences under *Occupational Safety and Health Act*, 2007; and

v. Offences under the *Labour Relations Act*, 2007.

72. The Court has considered the foregoing provisions on hearing of offences and returns that an alleged offence under section 25(1) of the *Employment Act*, cap 226 is amenable to hearing and determination by the appropriate magistrate's court. The Court further considers that the present civil proceeding is determined upon a balance of probability and unlike criminal proceedings determined upon the evidentiary scale or standard of proof of beyond reasonable doubt. The Court therefore returns that the prayer will collapse for want of due criminal justice proceedings.

73. To answer the 7th issue, the Court finds that the severe warning by the letter of 12.11.2020 amounted to imposition of unfair punishment. The severe warning was imposed on allegations that the claimant had been absent from duty in November and December 2019 as well as January and February 2020. It was also on alleged account that the claimant had failed to submit his balance score card report for the 2nd quarter FY 2019/2020. The claimant has by evidence shown that on 28.10.2019 he had written to the respondent's Board Chairman and through the Director of the respondent as follows:

> " Dear Sir,
>
> RE: Request for Sick/Convalescent Leave
>
> I am in receipt of a letter from the Director indicating that I am expected to meet the Board on 31st Oct. 2019 in order to conclude my CEO exit salary issue. Since it is almost 5 years since this problem surfaced, I must admit it has been very challenging to me both physically and mentally and has drastically impacted negatively on my health status.
>
> It may be important to note that in my 40 years of continuous service to the Institute, I never visited any hospital in my first 35 years for any personal ailment. In fact, my personal file at the office does not have any sick-sheet or sick leave request between the period 1980 – 2015 signifying a robust health status I enjoyed prior to 2014. However, between 2015 and now, because of the many unexplained uncertainties at the Institute regarding my status, circumstances have forced me to seek medical attention on a number of occasions.

Upon advise from my physician, and in line with our terms and conditions of service, I am submitting a request for a two-month Sick Convalescent to try and recuperate. Attached please find a write-up from one of my physicians at Mombasa Hospital on the same. Dr Gatambu of Mombasa Hospital is my second physician who could also give further details on my condition should it be necessary.

It is my hope that with this medical break, my health status may improve substantially. However, should I still be in a poor state of health after the two months' break, then I will have no choice but to seek for an early retirement noting that I am currently 60 with only 5 more years left to retirement.

I am attaching important details which may assist the Board in understanding the background of this issue and perhaps come up with policy decision to prevent a repeat of the same in future.

Sincerely yours,

Signed,

Dr Kazungu Johnoson, M PhD MBS

Chief Research Officer/KMFRI

Cc Chairs: KMFRI Board of Management Committees"

74. The attachments appear to have included the claimant's health status report addressed to whom it may concern on 16.10.2019 and signed by his physician one dr Kieran Mwazo, Consultant Physician Cardiologist thus,

" To whom it may concern

Johnson Kazungu 61 years old male

The above mentioned has been on follow up with us for the past two years.

His overall health remains suboptimal with uncontrolled blood pressures likely related to stress to a level that his functional level requires time off from work and we therefore recommend one month off duty and the progress will be reviewed thereafter...."

75. The claimant testified in Court thus, "Over the period I have been unwell and frustrated. Respondent has declined amicable settlement. I contributed a lot to the institute. I have worked for over 42 years and am retiring this year. Page 194 – 195 is my health report (as quoted above by dr Kieran Mwazo, Consultant Physician Cardiologist). Later I was diagnosed with cancer. Because of this case I went to hospital. I had otherwise been unwell. I see page 261 (the letter on severe warning dated 12.11.2020). I received it on account of absenteeism yet I was unwell. That letter of 12.11.2020 was unfair. I had already submitted doctor's report Even at meeting of 31.10.2019 Chairman was aware of my health status." The Court finds no good cause to doubt that evidence.

76. The Court has considered the evidence and finds that the claimant informed the respondent about his medical status. It appears to the Court that in view of the claimant's health status, he had a valid and genuine reason of absence from work for the alleged period of time. It also appears to the Court that in view of that absence on account of ill-health, the claimant could not work and deliver the balance score card report also subject of the severe warning that was imposed. The Court therefore finds that the respondent did not have a valid, genuine and fair reason to imposed the severe warning as was done. The Court finds that by writing the letter of 28.10.2019 and providing the relevant medical

records, the claimant offered good reasons for his needed sick leave and further raised a grievance that after withdrawal of his CEO's salary and the obtaining uncertain work environment, his health had seriously deteriorated. Besides raising the grievance as having suffered for over 5 years and suggesting amicable resolution such as sick leave and may be early retirement, it appears that the respondent failed to address the grievances and instead initiated disciplinary process culminating in the severe warning dated 12.11.2020. The Court finds that the severe warning was unlawfully imposed because under section 46 (h) of the *Employment Act*, it does not constitute a fair reason for dismissal or for imposition of a disciplinary penalty (such as the severe warning) in circumstances whereby the claimant had initiated or proposed initiation of a complaint against his employer, except where the complaint was shown to be irresponsible and without foundation. The Court finds that the circumstances were that for over 5 years the respondent had failed to purge the claimant's responsible grievance about the unilateral withdrawal of his CEO's exit salary and a difficult work environment which had occasioned or contributed to the abrupt deterioration of his health. The Court therefore returns that the claimant is in the circumstances, entitled to the declaration that the letter of severe warning or reprimand was unjustified, unwarranted, and therefore the letter is found as null.

77. To answer the 8th issue, the Court returns that the claimant has established a case for award of remedies as already found due in the judgment and as prayed for. The withheld remuneration as claimed at paragraph 33 of the memorandum of claim has been found established as justified. The order of prohibition as prayed has as well been found established. In granting the judicial review order of prohibition, the Court considers that the same is available under Article 23 (3) (a) of the *Constitution*. Further, it has been established that parties have continued to be in employment relationship and the continued withholding or cutting or slashing of the claimant's CEO exit salary per the impugned circular is such continuing injury whose arrest by way of an order of prohibition is found to be an efficacious remedy. As the claimant has succeeded in the suit, the respondent shall pay the costs of the suit.

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

i. The declaration that the respondent's actions and conduct amounts to violation and infringement of the claimant's constitutional rights and fundamental freedoms under Article 24(1), 28, 41, and 47 (1) of the *Constitution*, 2010 amounting to unfair labour practice and violation of the claimant's rights under the *Employment Act*, 2007 as pleaded for the claimant.

ii. The declaration that the respondent has no justification to down scale the claimant's CEO exit salary of ksh 486, 490.00 pm as approved by the Board in its 71st session of 08.12.2011.

iii. The declaration that at the time of change to Chief Research Officer the claimant had been the Director or Chief Executive Officer earning a total monthly salary of ksh 486, 490.00.

iv. The declaration that the respondent's Board of Management had no basis or justification for the amount offered to the claimant ksh 8, 928, 672.00 in the guise of payment of salary arrears from 01.07.2014 to 31.10.2019.

v. The declaration that by the action of the Board at its meeting on 31.10.2019 the respondent acknowledged that it was indebted to the claimant but failed to meet the debt demand squarely and properly.

vi. The order that the claimant is entitled to the balance of his arrears of salary ksh 23, 132, 244.00 with interest thereon at Court rates from the date of filing the suit to the date of payment in full.

vii. The order of prohibition be and is hereby issued prohibiting and restraining the respondent, its officers, agents, employees or any other person from reducing, cutting, or slashing the claimant's salary and other allowances on the basis of circular ref no OP/SCAC.1/12(II) whose terms in the case of the claimant are unlawful and unjustified to the extent that it has the effect of taking away the claimant's rights which had crystallized on the date of the claimant's exit from the position of Chief Executive Officer of the respondent and returned to the rank of Chief Research Officer.

viii. The declaration that the severe reprimand in the letter dated 12.11.2020 is unprocedural and unwarranted and unjustified in the circumstances of the claimant's case and null.

ix. The order for resumption of payment of the claimant's CEO's exit salary (exit basic salary of ksh 320, 000, exit house allowance of ksh 80, 000, exit medical allowance of ksh 2, 490, exit commuter allowance of ksh 24, 000, and other remunerative allowances of ksh 60, 000) with effect from 01.07.2014 to June 2019 together with access to the respondent's Group Medical Insurance Cover.

x. The declaration that the claimant is entitled to continued payment of his due CEO monthly remuneration at the rate of ksh 579,488.00 (as duly adjusted by the SRC resolution as effective 01.07.2020), less due PAYE and other statutory and contractual deductions, and, for the period effective January 2021 until the due date of his retirement and, any outstanding amounts thereof to be computed and included in the final decree flowing from this judgment.

xi. Compensation at 12 months at the rate of the claimant's CEO exit gross monthly remuneration being ksh 5, 837, 880.00 for unfair labour practices and violation of the claimant's constitutional rights and fundamental freedoms by the respondent as pleaded in paragraph 34 of the memorandum of claim and as compensation under Article 23(3) (e) of the *Constitution* of Kenya, 2010.

xii. The respondent to pay the claimant the sum of money awarded herein by 01.09.2022 failing interest to be payable thereon at Court rates from the date of this judgment till the date of full payment.

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

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 17TH JUNE, 2022.

BYRAM ONGAYA

JUDGE