



Chiloba & another v Chebukati & 6 others; Attorney General (Interested Party) (Petition 29 of 2018 & Cause 617 of 2019 (Consolidated)) [2022] KEELRC 14636 (KLR) (27 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 14636 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 29 OF 2018 & CAUSE 617 OF 2019 (CONSOLIDATED)**

NZIOKI WA MAKAU, J

OCTOBER 27, 2022

**IN THE MATTER OF: ARTICLES 10, 19, 20, 21(1), 22(10), 23(1),
27, 28, 41, 47, 232, 258 AND 259 OF THE CONSTITUTION**

AND

**IN THE MATTER OF: CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER
ARTICLES 27 AND 41 & 47 OF THE CONSTITUTION**

AND

IN THE MATTER OF: THE EMPLOYMENT ACT, 2007

AND

IN THE MATTER OF: FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

BETWEEN

EZRA CHILOBA PETITIONER

AND

WAFULA WANYONYI CHEBUKATI 1ST RESPONDENT

CONSOLATA BUCHA MAINA 2ND RESPONDENT

ABDI YAKUB GULIYE 3RD RESPONDENT

BOYA MOLU 4TH RESPONDENT

MARGARET MWACHANYA 5TH RESPONDENT

PAUL KURGAT 6TH RESPONDENT

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 7TH
RESPONDENT**



AND
ATTORNEY GENERAL INTERESTED PARTY
AS CONSOLIDATED WITH
CAUSE 617 OF 2019
BETWEEN
EZRA CHILOBA CLAIMANT
AND
INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION RESPONDENT

Whether an employer could send an employee on compulsory leave where it was not provided for in the employer's human resource policies and procedures

The claimant was aggrieved by the decision of the respondents to send him on compulsory leave, suspension and eventual termination from employment. The court held that compulsory leave was not provided for in the 7th respondent's HR and administrative policies and procedures manual and was thus unavailable to the respondents in the quest to remove the claimant from employment. The court further held that an employee was entitled to the right to a fair hearing and that the claimant was not accorded that right.

Reported by Kakai Toili

***Labour Law** - employment - leave - compulsory leave - whether an employer could send an employee on compulsory leave where it was not provided for in the employer's human resource and administrative policies and procedures manual.*

***Constitutional Law** - fundamental rights and freedoms - right to a fair hearing - where a meeting was held and a resolution was made to send an employee on compulsory leave without giving the employee written notice of the meeting or affording him a hearing - whether that employee's right to a fair hearing was violated.*

Brief facts

The claimant was the secretary of the Independent Electoral and Boundaries Commission (the 7th respondent). Being aggrieved by the decision of the 7th respondent to send him on compulsory leave, the claimant filed Petition No 29 of 2018 and thereafter Cause No 617 of 2019 following his suspension and eventual termination from employment. The two suits were consolidated. The claimant averred that the 1st, 3rd and 4th respondents purported to sit as a plenary session of the 7th respondent and resolved to send him on compulsory leave. The claimant claimed that he was not informed in writing of the meeting and neither was he afforded an opportunity to defend the decision to send him on compulsory leave.

The claimant averred that the internal audit report relied upon did not contain adverse findings against him and that the respondents violated provisions of various statutes and of the (Constitution). Further, the claimant averred that compulsory leave was not provided for in the HR and administrative policies and procedures manual. The claimant stated that his suspension was unlawful and irregular. Furthermore, the claimant averred that the procedure undertaken before termination of his employment was an abrogation of his constitutional rights to human dignity, privacy, access to information, fair labour practices and fair administrative action

The claimant sought for among others; a declaration that the purported internal audit report relied upon as basis for the notice to show cause which culminated in the claimant's termination was a nullity; a declaration



that his termination from employment was unlawful; and general damages for breach of his constitutional rights.

Issues

- i. Whether an employer could send an employee on compulsory leave where it was not provided for in the employer's human resource and administrative policies and procedures manual.
- ii. Whether failure to give an employee notice of a meeting and an opportunity to be heard in the meeting in which a decision to send the employee on compulsory leave was made, was a violation of the employee's constitutional right to a fair hearing.

Held

1. On Friday April 6, 2018, the 1st, 3rd and 4th respondents purportedly sitting as a plenary session of the 7th respondent resolved to send the claimant on compulsory leave. The claimant was however not informed in writing of the meeting. He was neither afforded an opportunity to defend the decision to send him on compulsory leave nor defend himself. The internal audit report relied upon by the respondents to make those moves against the claimant contained no adverse findings against the claimant or anyone else for that matter as to justify sending the claimant on compulsory leave.
2. The respondents violated various provisions of a number of statutes and the Constitution. The creature known as compulsory leave was not provided for in the 7th respondent's HR and administrative policies and procedures manual and was thus unavailable to the respondents in the quest to remove the claimant from employment. Under the HR and administrative policies and procedures manual and section 41 of the , an employee was entitled to a fair hearing and it was apparent the claimant was not accorded that right.
3. The claimant had sought a slew of reliefs a majority of which could not be granted. For instance, the claimant was not entitled to general damages for breach of his constitutional rights, nor was he entitled to payment for the balance of his term. In addition, the claimant was not entitled to back pay by virtue of annual increments due but not paid for twenty (20) months being Kshs 1,441,440.

Consolidated suit partly allowed; claimant awarded costs of the suit.

Orders

- i. *The claimant was entitled to the following: -*
 1. *A declaration that the purported internal audit report relied upon as basis for the notice to show cause which culminated in the claimant's termination was irregular, illegal and therefore a nullity.*
 2. *A declaration that his termination from employment was unfair, unlawful and unprocedural.*
 3. *Maximum statutory compensation for the unfair, unlawful and unprocedural termination being Kshs 14,022,360 (Kshs 1,168,530/- x 12 months)*
 4. *Payment of the claimant's service gratuity – Kshs 14,307,912.36 (31% per year under the contract)*
 5. *Payment of the claimant's salary during the suspension period Kshs 3,305,590 (August, September and October 2018)*
 6. *One month's pay in lieu of notice being Kshs 1,168,530.*
 7. *Interest on the sums in (c), (d), (e) and (f) above at court rates from the date of judgment till payment in full.*
 8. *A certificate of service from the 7th respondent in strict compliance with section 51 of the .*

Citations

Cases

1. *Abuya, Patrick v Institute of Certified Public Accountants of Kenya (ICPAK) & another (Cause 126 of 2014; [2015] KEELRC 154 (KLR)) — Applied*
2. *Amolo, Fredrick Saundu v Principal Namanga Mixed Day Secondary School & 2 others (Cause 747 of 2014; [2014] eKLR) — Explained*



3. Anuro, Walter Ogal V Teachers Service Commission (Cause 955 of 2011; [2013] KEELRC 386 (KLR)) — Mentioned
4. Attorney General v David Ndi & 73 others (Petition 12 (EO16) of 2020; [2021] KESC 17 (KLR)) — Followed
5. Hassan, Ahmed Issack v Auditor General (Petition 356 of 2014; [2015] KEHC 4712 (KLR)) — Mentioned
6. Kangwony, Isaiah Biwott v IEBC (Petition 212 of 2018; [2018] eKLR) — Applied
7. Kenya Transport Association Ltd v Cabinet Secretary Transport & Infrastructure & 5 others (Petition 16 of 2014; [2014] KEHC 5373 (KLR)) — Mentioned
8. Muthaura, Jane Wanja v Ethics and Anti-Corruption Commission (Petition 16 of 2015; [2021] KEELRC 1166 (KLR)) — Overruled
9. Mworira, Geoffrey v Water Resources Management Authority & 2 others (Constitutional Petition 4 of 2015; [2015] KEELRC 1124 (KLR)) — Mentioned
10. New Kenya Co-operative Creameries Ltd v Olga Ouma Adede (Civil Application 316 of 2014; [2015] KECA 815 (KLR)) — Explained
11. Okoiti, Okiya Omtatah v Joseph Kinyua & 2 others (Petition 51 of 2018; [2018] KEELRC 1750 (KLR)) — Mentioned
12. Okonji, Raphael Wellington V Sunthesis Ltd (Cause 1851 of 2011; [2012] KEELRC 184 (KLR)) — Mentioned
13. Republic v Institute of Certified Public Accountants of Kenya ex parte Joy Vipinchandra Bhatt T/ A JV Bhatt & company (Miscellaneous Civil Application 285 of 2006; [2008] KEHC 3231 (KLR)) — Applied
14. Speaker of the Senate & Another v Attorney General & 4 Others (Advisory Opinion Reference 2 of 2013; [2013] eKLR) — Mentioned
15. Standard Group Ltd v Jenny Luesby (Civil Appeal 291 of 2014; [2018] KECA 353 (KLR)) — Explained
16. Washeke, Elizabeth & 62 others v Airtel Network (K) Ltd & another (Cause 1972 of 2012; [2013] KEELRC 572 (KLR)) — Mentioned

Statutes

1. Constitution of Kenya, 2010 — Article 10, 27(1)(2); 29, 31(d); 35(1)(b); 41(1), 47, 232; In general — Interpreted
2. Employment Act, 2007 (Act No 11 of 2007) — Section 41, 43, 44, 45(2); 49(1); 51 — Interpreted
3. Employment and Labour Relations Court Act, 2011 (Act No 20 of 2011) — Section 12, 51(1); — Interpreted
4. Employment and Labour Relations Court (Procedure) Rules 2016 (Act No 20 of 2011 sub leg) — Rule 21 — Interpreted
5. Evidence Act (cap 80) — Section 107 — Interpreted
6. Fair Administrative Action Act, 2015 (Act No 4 of 2015) — In general ; Section 4(3) — Interpreted
7. Independent Electoral and Boundaries Commission Act, 2011 (Act No 9 of 2011) — Schedule 2, 4; Section 10(9); 11A; — Interpreted
8. Public Finance Management Act, 2012 (Act No 18 of 2012) — In general ; Section 73(5) — Interpreted

Advocates

None mentioned



JUDGMENT

Background

1. The petitioner/claimant was at all material times to the suits the secretary of the Independent Electoral and Boundaries Commission (IEBC) duly appointed to serve as its CEO, accounting officer and custodian of all commission records. Being aggrieved by the decision of the IEBC to send him on compulsory leave, the petitioner/claimant filed Petition No 29 of 2018 dated April 12, 2018 and thereafter filed Cause No 617 of 2019 dated September 16, 2019 following his suspension and eventual termination from employment. *Vide* the directions of the court of March 14, 2022, the two suits were consolidated to be heard together.

Petition 29 of 2019

2. The petitioner avers that on April 6, 2018, the 1st, 3rd and 4th respondents purported to sit as a plenary session of the 7th respondent and resolved to send him on compulsory leave. That he however was not informed in writing of the said meeting and neither was he afforded an opportunity to defend the decision to send him on compulsory leave. That the internal audit report relied upon contained no adverse findings against him or anyone else so as to justify sending him on compulsory leave and that the said respondents violated provisions of various statutes and of the Constitution of Kenya. Furthermore, compulsory leave is not provided for in the hr and administrative policies and procedures manual.
3. It is the petitioner's averment that in acting in the aforesaid manner, the 1st, 3rd, 4th and 7th respondents' action violated his rights to fair administrative action as contemplated in article 47 of the Constitution of Kenya and further abrogated articles 10, 27(1) and (2), 29, 41 and 232 of the Constitution. That the said respondents subjected him to an illegal removal from his employment and their actions and conduct were calculated to injure him. He avers that the said respondents violated the provisions of the second schedule and fourth schedule of the IEBC Act on the required quorum of five commissioners and the need to treat employees with courtesy and respect. The petitioner thus seeks declaratory orders to the effect that the 1st, 3rd, 4th and 7th respondents have acted in contravention of: the provisions of the second schedule of the IEBC Act as to the conduct of the business affairs of the commission; the provisions of the code of conduct contained in the fourth schedule of the Act; and the petitioner's fundamental rights and freedoms. He further seeks restraining and prohibition orders against the respondents, compensation and/or damages for violation of his rights, and costs of the petition.
4. In opposition to the petition, the 1st, 3rd, 4th and 7th respondents filed their replying affidavit sworn on June 24, 2022 by the 1st respondent and chairperson of the IEBC. The deponent avers that the petitioner's claim has been overtaken by events as the petitioner has since ceased working for the commission and moved on to greener pastures at the Communications Authority of Kenya (CAK). He further avers that as under the Constitution, the Commission is properly constituted as long as it constitutes at least three members at any given time. That since some of the commissioners resigned following the 2017 elections, the remaining three commissioners having reached the quorum could conduct meetings and make decisions that are in the usual course of conduct of the commission's business. That the decision to send the petitioner on compulsory leave pending investigations of the audit committee was therefore made by a properly constituted commission and was legal for all intents and purposes. It is his averment that the petition lacking in basis should thus be dismissed forthwith.
5. The 1st respondent further avers that the petitioner is lying about having not been informed that the meeting of April 6, 2018 would deliberate on matters regarding the impending audit and is



sensationalising the decision made by the commission so as to mislead this honourable court. That in fact on January 16, 2018, the commission wrote an internal memo to the petitioner seeking clarifications on the issues that had emerged from the tenders issued for elections materials for the fresh presidential elections held in 2017. That unfortunately, the commission was not satisfied with the petitioner's explanation and through a letter written by the chairperson to the director internal audit, risk and compliance committee, directed the conduct of a detailed review of the issues, which was done and culminated into a preliminary report dated April 5, 2018. That it is this preliminary report that was tabled before the commission's plenary meeting on April 6, 2018 and discussed before the general decision to send the petitioner on compulsory leave was then made to pave way for an expanded scope of the internal audit.

6. He further avers that the petitioner cannot legitimately argue that nothing in the preliminary report proved wrongdoing on his part to justify sending him on compulsory leave. That there was also no need to accord him an opportunity to defend the decision to send him on compulsory leave. That this court ought to disregard the petitioner's erroneous reading of the clauses in the manual and consequent assertion that nothing in the manual provides for compulsory leave. He asserts that the commission simply exercised its administrative function of oversight over a member of the commission, the petitioner, who was informed of the issues that had been raised on the tendering process, was given an opportunity to clarify said issues, meetings were held to discuss the issues in his presence and the decision to expand the audit was also made with his knowledge. That the respondents did not infringe the petitioner's rights to fair administrative action, equality before the law, dignity, fair labour practices and freedom from torture and he is therefore not entitled to damages. Furthermore, the petitioner having moved on to CAK, cannot purport to demand from this honourable court, injunctive orders restraining the respondents from interfering with the status and terms of his employment prior to him being sent on compulsory leave.

Cause 617 of 2019

7. The claimant seeks judgment from this honourable court against the IEBC for:
 - i. A declaration that purported internal audit report relied upon as basis for the notice to show cause which culminated in the claimant's termination was irregular, illegal and a nullity.
 - ii. A declaration that his termination from employment was unfair, unlawful and un-procedural
 - iii. General damages for breach of the claimant's constitutional rights
 - iv. Maximum statutory compensation for the unfair, unlawful and un-procedural termination being Kshs 14,022,360/- (Kshs 1,168,530/- x 12 months)
 - v. Payment of the claimant's service gratuity as indicated at clause 8 of the employment contract, being Kshs 14,307,912.36 (31% of every year under the contract)
 - vi. Payment of the claimant's salary during the suspension period Kshs 3,305,590/- (August, September and October 2018)
 - vii. One month's pay *in lieu* of notice being Kshs 1,168,530/-
 - viii. Balance of the contract from October 12, 2018 to February 2, 2020 being Kshs 19,702,716/- (being gross salary for 16 months)
 - ix. Back pay by virtue of annual increments due but not paid for twenty (20) months being Kshs 1,441,440/-



- x. An order that the respondent do issue the claimant with a certificate of service
 - xi. Costs of claim
 - xii. Any other orders that the court may deem fit and just to grant.
8. The claimant avers that his employment with the respondent was for a term of five (5) years renewable only once at the instance of the respondent. That the said contract commenced with effect from February 2, 2015 and as at October 12, 2018, he was earning a monthly gross salary of Kshs 1,168,530/-. He avers that his claim arises from the illegal, irregular, unfair and unjustifiable actions of the respondent categorised into compulsory leave, suspension and termination. His averments on the issue of compulsory leave reiterate those made in his petition.
 9. On the issue of suspension, the claimant avers that after a ruling of the court of June 14, 2018, the respondent purported to hold a plenary session that sent him on three months suspension pending a procurement audit relating to the 2017 general elections and the fresh presidential elections of October 26, 2017. That the decision to suspend him was clearly a reaction to the court's ruling rendered by Radido J on the said June 14, 2018 which ruling the respondent sought to circumvent or otherwise render ineffectual. He further avers that his suspension was unlawful and irregular because, again, the purported plenary session of the respondent was not properly convened and lacked quorum, he was not notified of the alleged offences necessitating the suspension, and the respondent irregularly and unjustifiably converted the compulsory leave to a suspension. Furthermore, he was not heard before the suspension and in an act of discrimination, other officers critical in the procurement and financial management of the commission during the period under review were not suspended. He contends that having already been on compulsory leave for over two months, the additional three months' suspension was irregular and more so unjustified as he learnt of the suspension through the 9 O'clock news report and the respondent's social media platforms.
 10. As regards termination, the claimant avers that the respondent issued him with a notice to show cause on August 29, 2018 inviting him to respond within seven days to the stated allegations which were based on an attached internal audit report that was being furnished to him for the first time. That the respondent shared the purported internal audit report with the media causing its wide publication before he had been given the opportunity to be heard on the issues raised therein. He avers that in any event, the said internal audit report was illegal, irregular and null and void because: its format was not the one contemplated under the *Public Finance Management Act* and attendant regulations; was not duly processed by the internal audit committee; was not duly processed by the respondent's plenary; did not have the inputs of the auditees as anticipated by law; was not carried out independently as the internal auditor acted under the direction of the commission's chairperson and commissioners, some of whom had conflict of interest; and the internal audit process was converted into disciplinary proceedings against the claimant.
 11. The claimant further avers that the respondents ignored his cry on the inadequate notice and time given to prepare his response to the show cause, and his request to access the respondent's records for him to prepare a defence. That this resulted in his inability to respond nor appear for his oral hearing slated on October 11, 2018 and that subsequently the respondent terminated his services and he was served with a letter of termination dated October 12, 2018. The claimant has in his memorandum of claim also given extensive explanations on the allegations raised in the said notice to show cause. He avers that the said allegations are unmerited, unsubstantiated and do not warrant any adverse findings against him and that the decision to terminate his employment amounted to wrongful, unfair, unlawful and irregular termination. That he was also denied an opportunity to lodge an appeal against the decision to terminate his employment.



12. It is the claimant's averment that the procedure undertaken before termination of his employment was an abrogation of his constitutional rights to human dignity, privacy, access to information, fair labour practices, and fair administrative action as set out under articles 28, 31(d), 35(1)(b), 41(1) and 47 of the Constitution of Kenya respectively. That during the period of the purported suspension and prior to the termination, the respondent did not pay him his lawful dues which he thus claims.
13. The respondent filed a memorandum of response dated January 13, 2020 averring that the claimant's termination was legal, regular, fair and justifiable. That the court gave it liberty to deal with the claimant in accordance with the law and the applicable contractual terms and it therefore dealt with him in accordance with the law. It also avers that this court has no jurisdiction to address the issue of requisite quorum of the IEBC as the same was settled in Petition 212 of 2018 - Isaiah Biwott Kangwony v IEBC [2018] eKLR through the judgment dated August 10, 2018; that the commission as then constituted, had the requisite quorum to conduct the constitutional functions assigned to it since the voluntary resignation of the other commissioners.
14. The respondent avers that the question of its decision to suspend the claimant was already determined by Hon Radido J in a ruling dated July 19, 2018 in Petition 29 of 2018 and that this court considering the issue of suspension would be sitting as an appellate court against the said ruling. It further avers that in yet another ruling of the court dated June 14, 2018 in Petition 29 of 2018, the court noted at paras 68 and 70 that the commission has powers to interdict an employee pending full investigations and to suspend an employee in serious cases. That paragraph 87 of the ruling dated June 14, 2018 further stated that the respondents were not restrained from dealing with the petitioner/applicant's case as provided for in terms of his contractual agreement. That it is on this advice that it suspended the claimant pending investigations and completion of the audit process.
15. It is the respondent's averment that whereas the claimant was required to respond to his show cause on or before September 5, 2018, he sent a letter to the respondents demanding for an extension of time on September 7, 2018 which extension it granted to him. That he nevertheless failed to satisfactorily answer the queries directed to him and further failed to attend a rescheduled oral hearing and that in so doing, deliberately avoided the entire disciplinary process. That it therefore made the decision to terminate his contract which was conducted in accordance with the law and due procedure and asserts that it availed to the claimant all necessary documents. That in any event, the claimant was able to respond to all the audit queries in these proceedings having been the custodian of all procurement documents. It denies there being any conflict of interest among the commissioners in as far as deliberations on the report on major procurements for the said 2017 elections were concerned. It is the respondent's averment that after the lawful termination of the claimant's contract following his negligent refusal to participate in the disciplinary proceedings, he was not entitled to any pay. The respondent prays that the claim be struck out and dismissed with costs.
16. In response, the claimant filed a reply to memorandum of response dated August 10, 2020 reiterating all the averments in his claim including that his termination was unfair, unlawful and unprocedural. He avers that though the respondent was given the liberty to deal with him in a manner specified in the contractual terms, he had a legitimate expectation that the respondent would be guided by principles of natural justice and that due process would be followed. He also avers that weekends and public holidays should not be included in counting the seven days within which he was to respond to the NTSC and that of the many documents he requested for, he was only given a document which had nothing to do with the allegations levelled against him. With regards to the claim of conflict of interest against Prof Guliye, he avers that the respondent has not provided any evidence of Prof Guliye's recusal from the committee proceedings. both the petition and the cause were determined on the basis of pleadings, affidavits and documents on record in terms of rule 21 of the Employment and Labour Relations Court



(Procedure) Rules 2016. As such no party gave oral testimony and parties filed submissions in respect of the 2 suits before the court.

Claimant/ Petitioner's Submissions

17. The claimant/ petitioner submits that he has demonstrated in his claim that the audit process was irregular and illegal and no logical explanation has been given for the blatant failure to follow procedure for conducting internal audits. That under regulation 174(6) of the Public Finance Management (National Government) Regulations, 2015, an internal audit committee of an independent office such as the respondent herein should have at least 3 members who are external to the institution. That in sum, the respondents having failed to accord him an opportunity to make representations during the audit process, everything done subsequently was an illegality. He relies in the case of Abmed Issack Hassan v Auditor General [2015] eKLR where Lenaola J (as he then was), noted the uncontested fact that the respondent failed to accord the petitioner a hearing before mentioning him adversely in the audit report and held that it does not matter whether evidence presented is overwhelming against a party or speaks adversely against that party because the right to be heard is a cardinal principle that must be granted to any person before a decision against him is made.
18. He further submits that the purported disciplinary committee was composed of only two members as four commissioners had resigned and that since it was irregularly constituted, it could not purport to hear and determine the disciplinary proceedings. Additionally, the decision to terminate his employment was not duly processed through the respondent's full commission meeting and the respondent ought to have produced the minutes of such meeting if it indeed took place. That the burden of proving such fact is upon the respondent as the custodian of the employment records but having failed to do so, it should be concluded that the committee report was never adopted by the full commission.
19. The claimant/ petitioner urges this court to find that he has proved on the required balance his claim for unlawful compulsory leave. That the 1st, 3rd, 4th and 7th respondents' purported decision to send him on compulsory leave was *ultra vires* pursuant to the provisions of section 10(9) of the IEBC Act. That the three months compulsory leave effectively removed him from office which would have necessitated invocation of the due process stipulated in section 10(9) of the IEBC Act which was however not followed. That the course taken by the 1st, 3rd, 4th and 7th respondents was thus unlawful and the same was properly annulled in the ruling of June 14, 2018. That in any event, disciplinary measures within the IEBC are undertaken as per its hr manual and the specific committee applicable to the petitioner/ claimant would be the standing disciplinary committee of the commission comprising of the 2nd, 3rd, 4th and 5th respondents. It is the petitioner/claimant's submission that the plenary session of April 6, 2018 which sent him on compulsory leave was not the standing disciplinary committee, and could not have whimsically constituted itself as such. He urges this court to consider the case of Republic v Institute of Certified Public Accountants of Kenya ex-parte Joy Vipinchandra Bhatt t/a JV Bhatt & Company wherein Emukule J (as he then was) reiterated the holding in R v Barnet London Borough Council ex p Nilish Shah [1983] 1 All ER 226 by Lord Carman that it is settled law that an administrative or executive authority entrusted with the exercise of a discretion must direct itself properly in the law.
20. It is the petitioner/claimant's submission that as averred in his petition herein, the conduct by the 1st, 3rd, 4th and 7th respondents was a violation of his right to fair administrative action. That to the extent that his claim challenges the respondents' exercise of administrative authority and carrying out the quasi-judicial function to suspend him, and to the extent that the said decision adversely affects him, he has properly invoked the court's intervention to check the said actions. That this position was appreciated in the case of Elizabeth Washeke & 62 others v Airtel Networks (K) Ltd & another



- [2013] eKLR. He further submits that fair administrative action as contemplated by article 47 of the *Constitution*, the provisions of the *Fair Administrative Actions Act*, common law and fair labour practices as stipulated in article 41 of the *Constitution* require that he be subjected to due process. That courts have where the disciplinary process is unfairly carried out and in breach of the employees' rights, interfered with the said process as similarly found in *Geoffrey Mworira v Water Resources Management Authority & 2 others* [2015] eKLR. It is his submission that the 1st, 3rd, 4th and 7th respondents are culpable for misfeasance of public office and are personally liable, as was reiterated by the court in *Kenya Country Bus Owners' Association & 8 others v Cabinet Secretary for Transport & Infrastructure & 5 others* [2014] eKLR.
21. As regards his suspension, the petitioner/claimant submits that the disciplinary actions available to the IEBC including suspension and interdiction are set out in clause 10.2.2 of the IEBC HR manual with suspension contemplated as a disciplinary measure and not a mere administrative measure. That he was thus entitled to be subjected to due process as set out in clause 10.2.6.2 of the IEBC HR manual before the suspension and that suspension ought to have been the last resort before dismissal and not an initial investigative or administrative measure as the respondent herein made it to be. He cites the case of *Fredrick Saundu Amolo v Principal Namanga Mixed Day Secondary School & 2 others* wherein Mbaru J noted that the Constitutional Court of South Africa articulated in *Chirwa v Transnet and others* [2008] 2 BLLR 29 and the same reiterated by the court in Industrial Court Petition No 150 of 2012 - *In the Matter of Joseph Mburu Kabiga et al v KENATCO Co Ltd et al* that for the interdict, suspension, dismissal or a termination to be valid, the same must meet the requirements of substantive and procedural fairness. The petitioner/claimant herein thus invites this court to find that his suspension was unlawful and unjustified.
22. As regards termination of his employment, the petitioner/claimant submits that sections 41 and 45(2) of the *Employment Act* require that there be a valid reason or reasons for the said termination, and that the procedure undertaken in terminating the employee be fair. That this position was espoused in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR and reiterated in *Jane Wanja Muthaura v Ethics and Anti-Corruption Commission* [2021] eKLR by Rika J who further stated that all termination of contracts of employment must meet the tests of substantive justification and procedural fairness. He submits that the respondent did not terminate his employment in a procedurally fair manner. That for instance some of the reasons given in his letter of termination were not contained in the notice to show cause meaning his contract was terminated based on reasons and issues he had not been given an opportunity to respond to. Furthermore, the respondents unfairly and unreasonably refused to avail to him the necessary documents and access to information he required to respond to the notice to show cause despite clearly undertaking to do so in the said notice to show cause. He relies on the case of *Patrick Abuya v Institute of Certified Public Accountants of Kenya (ICPAK) & another* [2015] eKLR where Radido J pointed out at paras 59 and 60 that a case of prejudice is easy to demonstrate where records are available but are not furnished to an employee. It is the claimant's submission that he has demonstrated that termination of his employment was also unfair, unlawful and un-procedural for want of valid reasons and fair procedure in accordance with sections 41, 43, 44 and 45 of the *Employment Act*.
23. The petitioner/claimant submits that violations of his rights under articles 28, 31(d), 35(1)(b), 41(1), 50, and 47 of the *Constitution* of Kenya are evident. He relies on the Court of Appeal decision in Civil Appeal No 291 of 2014 - *Standard Group Limited v Jenny Luesby* [2018] eKLR which found that:
- “ 55. ...So long as an employee can plead and prove breach of a constitutional right within the context of the employee's contract of employment or demonstrate that he is entitled to damages in circumstances as contemplated under the



Employment and Labour Relations Court Act (ELRCA), over and above those awardable for unlawful termination, we see no impediment for the trial court granting such relief. There are many cases, for example, where wrongful or unfair termination is intertwined with breaches of the bill of rights and there is no argument that different reliefs will ensue. The caution must, however, be borne in mind that a balance should be maintained between the interests of the employer and employee and the socio-economic interests of the country as a whole. "

24. He submits that he is entitled to the remedies sought in the memorandum of claim and that section 49(1) of the *Employment Act*, 2007 sets out several factors which the court ought to take account of in deciding the appropriate remedies to grant. That in Civil Appeal No 163 of 2017 - *New Kenya Co-op Creameries Limited v Olga Auma Adede* [2019] eKLR, the Court of Appeal quoted the decision in *Kenfreight EA Limited v Benson K Nguti* [2019] eKLR where the Supreme Court addressing the question of what an award of damages should be based on, clarified that payment of an award in section 49(1)(a) is different from an award under section 49(1)(b) and (c) and that a court is allowed to exercise its judicial discretion to grant any or all of the listed remedies in section 49 as guided by section 49(4)(m). The petitioner/claimant submits that as earlier pointed out in the *Standard Group Ltd v Jenny Luesby case* (supra), over and above those damages awardable for unlawful termination, and considering the express jurisdiction of the Employment and Labour Relations Court under article 162(2) of the *Constitution* as read with section 12 of the *ELRC Act*, this honourable court has no impediment in granting the general damages as pleaded in the memorandum of claim dated September 16, 2019.
25. He submits that further, section 49(1)(c) of the *Employment Act* provides for the primary remedies for unfair termination of employment/wrongful dismissal. That in *Raphael Wellington Okonji v Sunthesis Limited* [2012] eKLR, the court opined that although the law does not give the criteria for assessing the quantum for unfair termination, the consequences of the dismissal, circumstances for the dismissal, the difficulty with which to secure another job and the embarrassment suffered by the victim of the unfair dismissal, are among the key factors for consideration. He urges this court to apply these key factors to the present case and find that as a young professional, the termination was a blow to his financial commitments, tarnished his image and occasioned him gross embarrassment. For the claim of gratuity, he submits that under clause 8 of the employment contract, he was entitled to a service gratuity capped at 31% of every year under the contract which he prays this court awards while taking into consideration that his dismissal was unjustified and wrongful. He claims one month's pay *in lieu* of notice as per clause 16(a) of the employment contract, earned wages as per section 49(1)(b) of the *Employment Act* and costs of the suit as per section 14(4) of the *ELRC Act*. He submits that his prayer for a certificate of service is provided for under section 51(1) of the *Employment Act* and clause 10.4.11 of the IEBC HR and administration policies manual.

1st, 3rd, 4th and 7th Respondents' Submissions

26. In opposition to the petition, the 1st, 3rd, 4th and 7th respondents submit that they simply exercised their oversight role under section 11A of the *IEBC Act* when they resolved to send the petitioner on compulsory leave pending investigations into procurement irregularities. Furthermore, that article 250(1) of the *Constitution* of Kenya provides for at least three, but not more than nine, members for each commission. That it is in conformity with this that section 5 of the *IEBC Act* provides for the composition of the commission at seven, appointed in accordance with article 250(4) of the *Constitution*. It is their submission that whereas paragraph 5 of the second schedule to the *IEBC Act* provides that the quorum for the conduct of business at a meeting of the commission shall be at



- least five members, the Supreme Court in Supreme Court Petition No 12 of 2021 (Consolidated with petitions 11 & 13 of 2021) - *Honourable Attorney General & 2 others v David Ndiu & 79 others*, addressed the question on the commission's quorum with finality and settled that the IEBC had requisite quorum.
27. The 1st, 3rd, 4th and 7th respondents submit that where a conflict exists between the *Constitution* and any provision of statute, the *Constitution* prevails by virtue of article 2(1) and (3) of the *Constitution* and which issue was affirmed in the Supreme Court decision in Advisory Opinion Reference No 2 of 2013, *Speaker of the Senate & Another v Attorney General & 4 Others* [2013] eKLR. It is their submission that it therefore follows that the second schedule to the *IEBC Act* must be interpreted in line with article 250(1) of the *Constitution*. That the meeting held on April 6, 2018 was properly constituted and as such, the decision to send the petitioner on compulsory leave was in accordance with the law. They further submit that the petitioner was at all times treated with courtesy and respect and that section 4(b) of the fourth schedule to the *IEBC Act* requires members or employees of the commission to "treat the public and colleagues with courtesy and respect". That as per section 107 of the *Evidence Act*, he who alleges must prove but the petitioner has not presented before this court any set of facts and or evidence to prove that he was treated discourteously and with disrespect by the 1st, 3rd and 4th respondents.
28. They submit that section 73(5) of the *Public Finance Management Act* No 18 of 2012 requires every national government public entity to establish an audit committee. That clause 10.2.5.1 of the IEBC HR and Administration policies and procedures manual further provides that interdiction of a member or employee of the commission will be considered to allow full investigation of minor offences, which may be considered serious, or to enable the employee to be removed from a difficult position. That therefore pursuant to the foregoing statutory provisions and the IEBC HR manual, they are enjoined to carry out an oversight role over the actions of the members and employees of the commission and that dispensation of this role cannot be said to constitute an infringement of a member's rights.
29. As whether the petitioner is entitled to the redress he seeks, the 1st, 3rd, 4th and 7th respondents submit that the court in Petition No 51 of 2015 - *Okiya Omtatah Okoiti v Joseph Kinyua, Public Service Commission & Attorney General* while noting that there is no statute that provides for compulsory leave, held that under the statutory provisions cited applying to the public service, a suspension or interdiction must be in strict compliance with the relevant disciplinary procedures. That this means compulsory leave shall only be considered lawful where a disciplinary process is ongoing and where the relevant disciplinary procedures are complied with and which is what happened in the petitioner's case. They submit in conclusion that this honourable court be pleased to dismiss the petition dated April 12, 2018 for reasons that: the 1st, 3rd and 4th respondents constituted a proper quorum for purposes of conducting the affairs of the commission; the petitioner was at all times treated with courtesy and respect; the petitioner was afforded an opportunity to provide clarifications of the issues raised before the decision was made; and the decision to send the petitioner on compulsory leave was lawful.
30. In submissions dated June 27, 2022 filed in Cause No 617 of 2019 consolidated herein, the IEBC (respondent) submits that the petitioner's contractual position was any worse during the period of his compulsory leave since he was paid his contractual salary and remuneration in full. That as regards compulsory leave, article 47(2) of the *Constitution* does not even require that reasons must be given for administrative action, except where "a right or fundamental freedom of a person has been or is likely to be adversely affected by [the proposed] administrative action". That this is similarly recognized in section 4(3) of the *Fair Administrative Action Act*. That in the instant case, the IEBC took administrative action in its private law capacity as an employer, and since none of the rights or



fundamental freedoms of the petitioner/claimant was implicated, the instant claim herein cannot be sustained.

31. The IEBC submits that the petitioner/claimant's suspension was lawful having been carried out in accordance with the applicable laws, guidelines and procedures. That clause 10.2.5.3 of the IEBC HR and administration policies and procedures manual of October 2010 allows the IEBC to suspend an employee as a last resort before dismissal, "for serious offences to allow for full investigations". That as spelt out in the claimant's letter of appointment, the provisions of the manual and other commission staff rules and regulations were applicable to his contract of service as seen in clauses 5 and 20. That since there were clearly serious issues that warranted full investigations, the IEBC was entitled to take the actions it did against the petitioner/claimant. It submits that on suspension there was compliance with section 10(9) of the IEBC Act even before the action had not yet escalated to a disciplinary hearing. Furthermore, pursuant to powers granted to the commission under clause 1.7 of the HR manual, October 2010 and clause 9(2) of the second schedule to the IEBC Act, the commission plenary had the mandate to deliberate on the suspension of the claimant in the absence of a disciplinary committee and a committee of the commission exercises delegated powers of the plenary.
32. The IEBC submits that the decision to terminate the employment of the petitioner/claimant was valid, fair and lawful because the reasons advanced for the termination were valid and a fair procedure was followed as under section 41 of the Employment Act. That it afforded the claimant every possible opportunity to respond to the allegations affecting his continued employment but he spurned every such opportunity and that in light of the magnitude of the issues involved, the public interest and its indictment by the Supreme Court, it had a responsibility as an employer to ensure that its business was carried out by employees exhibiting fidelity to the institutional ideals and hierarchy. It is the submission of the IEBC that the remedies sought against it cannot inure as the said compulsory leave, suspension and termination were within the lawful authority of the IEBC as an employer and that it followed a fair and proper procedure. The IEBC submits that the claim and petition herein be dismissed with costs.
33. The petitioner/claimant was a man wronged from all accounts in both the petition and the cause. It is clear there was animus between him and the 1st respondent, chair of the Independent Electoral and Boundaries Commission. It would seem the 1st respondent ran the organisation rough shod with fiats being issued against employees such as the petitioner for doing their work which was not to the liking of the 1st respondent. It is a finding of fact that Friday the April 6, 2018, the 1st, 3rd and 4th respondents purportedly sitting as a plenary session of the 7th respondent resolved to send the petitioner on compulsory leave. It is evident the petitioner was however not informed in writing of the said meeting. It is also apparent that he was neither afforded an opportunity to defend the decision to send him on compulsory leave nor defend himself. The internal audit report relied upon by the respondents to make this moves against the petitioner contained no adverse findings against the petitioner or anyone else for that matter as to justify sending the petitioner on compulsory leave. It is clear the respondents violated various provisions of a number of statutes and the Constitution of Kenya. The creature known as compulsory leave is not provided for in the 7th respondent's HR and administrative policies and procedures manual and was thus unavailable to the respondents in the quest to remove the petitioner from employment. Under the HR and administrative policies and procedures manual and section 41 of the Employment Act, an employee is entitled to a fair hearing and it is apparent the petitioner was not accorded this right.
34. The petitioner has sought a slew of reliefs a majority of which cannot be granted. For instance, the petitioner/claimant is not entitled to general damages for breach of the claimant's constitutional rights, nor is he entitled to payment for the balance of his term. In addition, the petitioner is not entitled



to back pay by virtue of annual increments due but not paid for twenty (20) months being Kshs 1,441,440/-. He however is entitled to the following:-

- i. A declaration that the purported internal audit report relied upon as basis for the notice to show cause which culminated in the claimant's termination was irregular, illegal and therefore a nullity.
- ii. A declaration that his termination from employment was unfair, unlawful and un-procedural.
- iii. Maximum statutory compensation for the unfair, unlawful and un-procedural termination being Kshs 14,022,360/- (Kshs 1,168,530/- x 12 months)
- iv. Payment of the claimant's service gratuity – Kshs 14,307,912.36 (31% per year under the contract)
- v. Payment of the claimant's salary during the suspension period Kshs 3,305,590/- (August, September and October 2018)
- vi. One month's pay *in lieu* of notice being Kshs 1,168,530/-
- vii. Costs of the suit
- viii. Interest on the sums in iii), iv), v) and vi) above at court rates from the date of judgment till payment in full.
- ix. A certificate of service from the 7th respondent in strict compliance with section 51 of the [Employment Act](#).

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF OCTOBER, 2022.

NZIOKI WA MAKAU

JUDGE

