



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO.23 OF 2020

JOHN MUNEENI MAKAU.....PETITIONER

VERSUS

CHARITY KALUKI NGILU,

GOVERNOR KITUI GOVERNMENT.....1ST RESPONDENT

THE COUNTY GOVERNMENT OF KITUI.....2ND RESPONDENT

JUDGEMENT

The petitioner filed the instant petition on 18th February, 2020 and amended the Petition dated 24th March, 2020.

The petitioner is seeking the following orders;

(1) A declaration does issue that the termination of John Muneeni Makau as the County Executive Committee Member, Ministry of Environment and Natural Resources, Kitui County Government was illegal, null and void and contrary to Article 1; 2; 10; 21; 27; 28; 41; 47; 50 and 232 of the Constitution of Kenya 2010 as read with Employment Act of Kenya and the Fair Administrative Action Act;

(2) An Order of compensation and general damages does issue pursuant to Article 23 of the Constitution directing the County Government of Kitui and the Governor of the County Government of Kitui to pay damages to John Muneeni Makau the petitioner herein for the violation and contravention of his fundamental rights and freedoms and his unlawful dismissal.

(3) An order does issue pursuant to Article 23 of the constitution directing the County Government of Kitui and the Governor of the County Government of Kitui to reinstate the Petitioner herein, John Muneeni Makau as the County Executive Member, Ministry of Environment and natural Resources, Kitui County Government.

(4) In the alternative to prayer (3) above and without prejudice thereof, an Order does issue pursuant to Article 23 of the Constitution, Section 12 of the Employment and Labour Relations Act and section 49 of the Employment act directing the County Government of Kitui and the Governor of the County Government of Kitui to pay the petitioner herein, Jon Muneeni Makau, the equivalent allowances, salaries and benefits he ought to have earned during the entire appointment period of five years as loss of earning as a result of his removal as County Executive Committee Member, Ministry of Environment and Natural Resources, Kitui County government.

(5) An Order does issue pursuant to Article 23 of the Constitution; section 12 of the Employment and Labour Relations Court Act and section 49 of the Employment Act directing the County Government of Kitui and the Governor of the County Government of Kitui to pay the Petitioner herein, John Muneeni Makau, the equivalent allowances, salaries and benefits he ought to have earned as a result of his removal as the County Executive Committee Member, Ministry of Environment and Natural Resources, Kitui County government as particularised hereunder;

a) Total earning for the period Ksh.10,878,160.80/=

b) Family medical benefits/allowances as per the medical cover as issued by heritage Insurance Company Limited (to be assessed).

c) Monthly standing allowances Ksh.50,000/- per month by 35 months = Ksh.1,750,000/=

d) Credit Card benefits/allowances Ksh.10,000/= per month by 35 months Ksh.350,000/=

e) Field/out of station/out of County and other ancillary allowances Ksh.200,000/= per month by 35 months Ksh.7,000,000/=

f) Dues for leave days not taken Ksh.267,968.75/=

g) Gratuity Ksh.2,929,093.13. Total Ksh.23,175,222.6/=

(6) An order does issue pursuant to article 23 of the constitution directing the County government of Kitui and the Governor of the County Government of Kitui to pay the petitioner herein, John Muneeni Makau, his dues and

emoluments for the days and leave days not taken as the County executive Committee Member, Ministry of Environment and natural Resources, Kitui County Government; and service gratuity.

(7) An order awarding costs to of the petition to the petitioner.

(8) Any other or further orders, writs and directions this court considers appropriate and just to grant for the purposes of the enforcement of the petitioner's fundamental rights and freedoms.

The petition.

The petitioner is an adult and was before this petition the County Executive Committee Member, Ministry of Environment and Natural Resources at the Kitui County Government. The 1st respondent is the governor Kitui County pursuant to article 180 of the constitution. The 2nd respondent is the Kitui County government pursuant to article 176 of the constitution.

The petitioner was appointed by the respondents on 7th November, 2017 a County Executive Committee Member (CECM) earning ksh.262,500 per month and the appointment was for the term ending the year 2022 per the current office of the 1st respondent.

On 4th February, 2020 the petitioner together with other staff undertook a study tour to Voi Geology Centre and unfortunately they were involved in a car accident along Kibwezi-Kitui Highway which accident resulted in fatalities.

The accident prompted the 2nd respondent to release a press statement to the members of the public and on 6th February, 2020 the petitioner received letter from the Kitui County Government County Secretary directing him to give an explanation about his trip to Taita Taveta County and his involvement in the said accident.

On 7th February, 2020 the petitioner received notice of termination of employment by summary dismissal without being given any reasons or being afforded an opportunity to be heard. The 1st respondent relied on the provisions of section 31(a) and 40(1) of the County Government Act without giving details.

On 13th February, 2020 the petitioner replied to the letter dated 2nd February, 2020 despite the summary dismissal taking into account he had not been given a hearing and aggrieved by the prejudice caused moved the court with the instant petition and pursuant to articles 10 and 232 of the constitution.

The petition is based on the provisions of article 2, 3, 10, 21, 22, 27, 41, 43, 47, 50, 73 and 232 of the constitution.

The petitioner is aggrieved by the actions of the respondents for being illegal, unreasonable, unjustifiable and contrary to the constitution and the law. Prior to termination of his employment there was no notice issued contrary to the letter of appointment and this has occasioned him great prejudice due to infringement of his right. There was discrimination against the petitioner contrary to article 27 of the constitution; his rights to fair labour practices were violated contrary to article 41 and leading breach of the constitution hence this petition pursuant to article 22 of the constitution.

The decision of the 1st respondent was arbitrary and in breach of articles 10 and 232 of the constitution. There was an obligation on the respondents to consider the provisions of article 73 of the constitution and also failed the principles of article 173 where the object of devolution is to promote democratic and accountable exercise of power.

Over the period of appointment and employment of the petitioner, the respondents did not afford him a hearing for any indiscipline resulting in unfair labour practice. He never took his annual leave for 15 days in the year 2019 and which amounts to a total of 90 leave days until the end of his term in the year 2022.

The petitioner was entitled to gratuity of Ksh.2,929,093.13 and this should be awarded.

Over the period of appointment the petitioner was entitled to various benefits;

a) Gross salary Ksh.262,500;

- b) Family medical cover;
- c) Monthly standing allowance Ksh.50,000;
- d) Monthly credit card benefit/allowance Ksh.10,000; and
- e) Filed/out of station/county allowance Ksh.200,000.

The petitioner had a legitimate expectation that he would receive these allowances, salaries and benefits for his entire employment with the respondents pursuant to section 42 of the County Government Act and until after the general elections in the year 2022 once a new county executive committee was constituted.

The petitioner would have therefore earned the following;

- a) Total earning for the period Ksh.10,878, and 160.80;
- b) Family medical benefit;
- c) Monthly standing allowances Ksh.1,750,000;
- d) Credit card allowance Ksh.350,000;
- e) Filed allowances ksh.200,000;
- f) Dues for leave days not taken Kh.267,968.75; and
- g) Gratuity Ksh.2,929,093.13. Total ksh.23,175, and 222.6.

The petition is supported by the affidavit of the petitioner and who avers that upon appointment as CECM by the respondents he worked diligently until 4th February, 2020 when he had an accident while on duty to Taita Taveta and upon which he was required to give an explanation and before he could do so by letter and notice dated 7th February, 2020 his appointment was terminated by summary dismissal. This has caused him mental anguish and trauma following the accident and termination of his appointment. This has strained his health and caused mental distress. The actions of the respondents were arbitrary and without due process and contrary to his legitimate expectation to serve for his term until the year 2022.

The petitioner also avers that since his appointment he had not taken his annual leave; he was entitled to allowances and benefits; salaries and payment of gratuity at the end of his term which should be awarded by this court.

Responses

The respondents replied to the Petition and the Amended Petition that the allegations made in the petition are denied and the respondents have not violated the constitution or the law. the 1st respondent acted in accordance with section 31(a) Of the County Government Act which allow the dismissal of a CECM upon consideration that it is appropriate or necessary to do so and pursuant to section 41(d) of the County Government Act which gives the 1st respondent power to execute duties as may be necessary for the office as necessary.

The 1st respondent appointed the petitioner as CECM subject to termination at any time in the event that the petitioner was not performing and or conducted himself inappropriately or he was in breach his obligations arising under the contract of service warranting summary dismissal as provide under section 44(1) and (3) of the Employment Act.

The petitioner failed to discharge his functions dutifully and diligently and instead chose to be lazy, abused his powers and became a liability to the County Government of Kitui together with the residents. There were several complaints from the public and county employees in regard to the discharge of the petitioner's functions.

There are a series of events that led to the petitioner's summary dismissal. He was incompetent and non-performer. He had on several occasions embarrassed and tarnished the name of the respondents and the procedure leading to the resolution for removal of the petitioner herein was constitutional and in compliance with chapter 6 and article 10 of the constitution. there was due process ad summary dismissal was in accordance with section 41 and 43 of the Employment and Labour Relations Act¹ and the petitioner had breached his obligations as an employee of the county. Such breach justified summary dismissal pursuant to section 44(1) and (3) of the Employment Act.

On 28th November, 2018 the petitioner obtained precious stones from a group called MKM Artisinal Mining in the promise of selling the stones on their behalf for ksh.280,000. He did not give them their money. He obtained the money by false pretences. Members of the group kept visiting his offices in vain. The petitioner actions were criminal in nature and in total embarrassment to the respondents and a warning letter was issued to him in this regard.

The petitioner was an under performer with gross misconduct that led to his dismissal as a CECM. He had been served with several warnings and notice to show cause to give reasons why he should not be dismissed.

On 4th February, 2020 the petitioner using the County resources and vehicles went to an unsanctioned trip to Voi the respondents did not have money to facilitate the said trip but the petitioner chose to disobey and went on the trip. His actions jeopardised and undermined the authority of the respondents.

While on the unauthorised trip, the petitioner was involved in an accident with a motorcycle causing the death three (3) people. The petitioner and the driver pleaded guilty to the count of killing the 3 people by dangerous driving and were fined Ksh.185,000 at Kitui Law Courts.

The petitioner and his driver were drunk when the accident occurred. He went ahead and admitted liability to the said accident and hence tarnished the name of the respondents and making the county liable for the accident.

The accident occurred during a trip the respondents were not aware of and thus cannot be held liable for any mental trauma of the petitioner and he is the sole author of his misfortunes.

The demand for payment of Ksh.23, 175,222.6 is tantamount to greed and the petitioner is not entitled to the claim.

The petitioner was subjected to the due process, the summary dismissal was justified and lawful and the petition should be dismissed with costs.

The response is also supported by the Affidavit of Joshua K. Chepchieng the County Secretary of the 2nd respondent and who avers that he has authority of the respondents to respond herein and conversant with the petition herein pursuant to section 44(3) of the County Government Act and that the responses made by the petitioner are without substance as his dismissal from employment of the respondents was for justified as he was an under performer and incompetent.

The allegations that the petitioner was not supplied with evidence of his underperformance and laziness is that while he headed the Ministry of environment and natural resources he spent a lot of money on trips to different counties to lobby and learn on conservation and mining. These trips and meetings were being paid for by tax payers money and was to help with the effective running of his docket but he failed to implement the same within the 2nd respondent due to incompetence leading to the respondents being sued in **ELC Petition E6 of 2020, Machakos** for failure to conserve the environment and the rights of the residents of the 2nd respondent to a healthy environment. There is an order restraining the respondents from harvesting sand at Tiva River within Kitui County due to environmental degradation and lack of proper by-laws by the respondents to regulate sand harvesting. The neighbouring counties of Makueni and Machakos have such by-laws and therefore the petitioner was unable to do the same in his docket.

Mr Chepcheing also avers that the petitioner has severally embarrassed the respondents. Members of the public have made several complaints against him leading to issuance of a warning. The Artisinal Mining Group by letter dated 28th November, 2018 made a complaint against the petitioner after they gave him precious stones upon a promise that he would sell and pay them Ksh.280, 000 which he failed to do.

Under section 31 of the County Government Act the 1st respondent has power to dismiss the petitioner for good cause. The appointment of the petitioner was subject to proper performance of his duties and a breach of which warranted termination and the petitioner cannot purport to state that he should be paid for the entire term of the 1st respondent.

In reply thereof, the **petitioner also filed his Further Affidavit** and avers that the reply to the petition by the respondents is improper and incompetent as the County Secretary cannot purport to act for the 1st respondent under section 31 of the County Government Act and cannot issue the letter terminating employment and he is not a party to these proceedings.

The petitioner also avers that his summary dismissal was driven by malice evidenced by conflicting letters issued to him one by the County secretary ensuring about his trip to Voi and the other dismissing him from his employment. The 1st respondent acted contrary to the law and in contravention of the constitution by acting in an arbitrary manner and without following article 47 procedures. The accusations of underperformance and laziness have never been brought to his attention until the petition was filed only as an afterthought to justify the illegal termination of employment.

The petitioner also avers that the alleged complaints from a group of Artisinal Mining has never been brought to his attention. The issue of precious stones does not arise. No particulars of such matters were particularised. The issue was resolved as part of the petitioner's official duties. By letter dated 16th April, 2019 the matter was resolved and cannot be a basis for summary dismissal. The precious stones never came into his possession and were with the principal geologist, Bernard limo and Abraham Kova and the 1st respondent never sought for any clarifications from the petitioner.

The petitioner further case is that his trip to Voi was sanctioned by the respondents on 4th February, 2020 and the County and Ministry were involved. A press statement was released by the respondents in this regard.

Following the accident on 4th February, 2020 the petitioner was not arrested or charged or fined before any court as alleged by the respondents. Such allegations are not true and the respondents should be reprimanded. The accident was addressed by the subject driver who was convicted. The allegations that the petitioner as drunk is only meant to tarnish his name. The accused was Josphat Syengo Kimwele and was convicted in **SPMCC Traffic Case No.204 of 2020 – Republic v Josphat Syengo Kimwele** and the petitioner was not a party.

The allegations that the petitioner has several warning letters is without evidence neither was there any notice to show cause as to why employment should not be terminated was ever issued. The letter by the County Secretary dated 6th February, 2020 was not a notice to show

cause and the petitioner was only required to state the activity he was undertaking in Taita Taveta County.

The petitioner also avers that the powers under section 31 of the County Government Act are not absolute. They cannot be exercised in an arbitrary manner. Due process is required. Such are subject to the constitutional dictates. Pursuant to section 42 of the County Government Act his appointment was to last until the term of the 1st respondent.

He was diligent in his duties and no case of under-performance came to his attention. He has no pending case with the Ethics and Anti-Corruption commission as a CECM; he held meeting with his staff and responded to all matters raised with the County Assembly of Kitui; he advised the 1st respondent accordingly and was appointed as chairperson of the Intergovernmental County Committee on Assets and Liabilities; he spearheaded the enactment of the Kitui Climate Change Regulations, 2018 and which led to the 2nd responding being funded by the World Bank; he succeeded in the banning of commercial charcoal and sand harvesting in the county; and implemented key projects within the 2nd respondent with the knowledge of the 1st respondent and hence the averments made in reply to his petition are only meant to defeat the course of justice and should be dismissed.

Written submissions

By consent, the parties agreed to address the petition by way of written submissions.

The petitioner submitted that his rights have been violated and the summary dismissal by the respondents is not justified. There was no notice or hearing and the actions of the 1st respondent were arbitrary and illegal contrary to article 27, 41, 47, 28, 50 and 232 of the constitution. He was discriminated against and the denial of a hearing was contrary to fair labour practices and fair administrative action resulting in failure of good governance and accountability. As a public officer he was entitled to be given a hearing and the respondents acted contrary to authority bestowed under article 73 of the Constitution.

The powers of the 1st respondent under section 31 of the County Government Act are subject to the constitution as held in **Umuro Roba Godana versus County Government of Marsabit & another, ELRC Petition No.12 of 2016 [2017] eKLR** that a governor before application of section 31 of the County Government Act in dismissing a CECM must accord due process and hearing and give reasons leading to such decision. Removal from office under section 31(a) and 40 of the County Government Act comprise different and separate provisions as held in

Richard Bwogo Birir versus Narok County Government & 2 others [2014] Eklr on the one hand under section 31(a) a notice to show cause should issue to allow the CECM be given a hearing and on the other hand section 40 allow a governor to dismiss a CECM for good cause or where appropriate or necessary. There must be reasonable grounds.

In the case of **Cecilia Wangechi Ndungu versus County Government of Nyeri & another [2014] eKLR** the court held that elected and appointed leaders, state officers or public officers do not hold individually generated goals that constitute political will and goals mysterious to the constitution. article 10, 73 (2) and 129 of the constitution provides for values and principles, accountability and that executive authority derives from the people and should be exercised in accordance with the constitution and in this regard section 31 and 40 of the County Government Act underscores a step by step procedure prior to dismissal of a CECM.

In the case of **Peter Lokol Lomulen & 2 others versus Governor, County Government of Tukurana & 3 others [2016] eKLR** the court held that a governor can only dismiss a CECM under section 40 of the County Government Act where appropriate or necessary which means there must be reasons given. The dismissal must be justified and under section 31(a) of the County Government Act makes it mandatory that a dismissal of a CECM must be for given reasons.

In this case there are no reasons given leading to the dismissal of the petitioner whereas section 31(a) and 40(1) of the County Government Act are couched in mandatory terms. The allegations made that the petitioner had several warning letters is without evidence and the letters filed were never brought to his attention until the petition was filed. Such is contrary to fair administrative action and fair labour practices pursuant to articles 47 and 41 of the constitution.

The petitioner submitted that the remedies sought are due and for the violation of his rights he is entitled to damages of Ksh.5,000,000 as held in **John Gakuo & another versus County Government of Nairobi & others Civil Appeal 201 of 2016 [2018] eKLR** where the petitioner was awarded ksh.1,500,000 for violation of his constitutional rights and in the case of **Parliamentary Service Commission versus Christine Mwambua, Civil Appeal No.75 of 2016 [2018] eKLR** the Court of Appeal allowed a reinstatement of the employee in a case of unfair termination of employment. The petitioner is entitled to the claims made with costs.

The respondent submitted that the petitioner as an employee of the respondents breached his obligation under the contract of service warranting summary dismissal under section 44 of the Employment Act and cannot justify claims made until the year 2022.

The respondents have not violated section 31 (a) of the County Government Act which gives the 1st respondent power to dismiss a CECM at any time where appropriate or necessary and in this case the petitioner failed integrity test pursuant to chapter 6 and article 50 of the constitution. There was due process under section 41 and 43 of the Employment Act where the petitioner was found to be in breach of his contract. The petitioner also failed to discharge his duties diligently leading to complaints by members of the public particularly the MKM Artisanal Mining where he offered to buy their precious stones for Ksh.280, 000 and he never paid them. The petitioner had an accident while on an unauthorised trip to VOI and where 3 people dies, he and the driver were drunk and were charged in court and fined for the offence.

The actions of the petitioner were against the interests of the respondents and warranted summary dismissal as held in **Petition 86 of 2016 – Grace Kavinya Muimi versus Governor, Kitui County & 2 others [2018] eKLR** that termination of employment so as to protect the public interest does not affect its validity. Under the letter of appointment the petitioner was required to work for the public interest and when he accepted to sell precious stones from members of the public he never disclosed such fact to the 1st respondent creating a conflict of interest. Following an accident on 4th February, 2020 he was charged in court and filed Ksh.185, 000 creating liability and putting the respondent into disrepute.

The 1st respondent was within her right to dismiss the petitioner as held by Court of Appeal in County Government of Nyeri versus Cecilia Wangechi Ndungu [2015] eKLR that a governor assigns a CECM with work and in this respect where there is no confidence in the CECM the law allow for removal to allow for the proper functioning of the county business. The court must be alive to the reality that employment relationship requires personal contact between the employer and employee, mutual trust and confidence and where these are broken such warrant termination of the employment relationship as held in **Evans Wafula Makokha versus Uasin Gishu County Public Service Board [2015] eKLR**.

The respondents also submitted that the remedies sought are not due and should be dismissed with costs.

Determination

On the pleadings, affidavits and written submissions, the issues which emerge for determination can be summarised as follows;

Whether there are constitutional and legal rights violations;

Whether the remedies sought should issue; and

Who should pay costs.

It is common cause that the petitioner was appointed by the 1st respondent as CECM for the 2nd respondent vide letter dated 5th November, 2017 under the docket of Environment and Natural Resources in accordance with section 35 of the County Government Act and under clause (1) of the appointment the parties agreed as follows;

1. Duration

Your appointment commencing 6th November 2017 shall be subject to the relevant laws especially the County Government Act and the applicable relevant human resource guidelines.

It is also not in dispute that on 4th February, 2020 the petitioner had an accident along Kitui-Kibwezi road. The accident was between the petitioner's official vehicle and a motorcycle rider who died together with two others.

Following this accident on 4th February, 2020 the County Secretary Dr Joshua Chepcheing wrote to the petitioner memo as follows;

Subject: Motor Vehicle Accident

It has come to my attention that an accident involving your official vehicle and a motor cycle ... it has also been indicated that the vehicle which was carrying yourself and other officers was returning from a trip from Taita Taveta County. The trip had not been cleared by H.E. the Governor as earlier directed that official functions outside the county should be brought to the attention of the Governor and the County Secretary to note for feedback purposes.

This is to request you to give us the activity you went to undertake in Taita Taveta County, confirm if the Governor was in picture and what were the benefits of the functions to the county. ...

Of importance here, the petitioner was not given a timeline within which to reply to the memo by the County secretary.

On equal date, 6th February, 2020 the Director, Environment and Natural Resources made an *Incidence Report on the Accident Involving Vehicle No.15CG048A* and relating to the visit to Taita Taveta County with two vehicles KBU 948T and 15CG048A and on the return journey, vehicle 15CG48A on board the petitioner was involved in an accident with motorcycle with a rider and two persons on board along Kitui-Kibwezi road. The matter was reported to makindu police base, the driver of vehicle 15CG48A recorded statement and was released on cash bail of ksh.20,000 to attend court on 18th February, 2020.

On 7th February, 2020 the 1st respondent issued notice to the petitioner releasing him from duty as CECM and in the following terms;

RE: RELASES FROM DUTY AS CECM

Pursuant to the various communications I have held with you in relation to your work as the CECM for Environment and natural Resources and the need to ensure that the people of Kitui are well served.

In exercising the powers conferred by Section 31(a), (d) and 40(1) of the County Government Act No.17 of 2012, I hereby relieve

you from the position as the CECM in the County Government of Kitui.

This decision will take effect immediately. He County Secretary will supervise your handing over process. ...

On 13th February, 2020 the petitioner responded to the vehicle accident and in reference to memo issued by the County Secretary dated 6th February, 2020 and where he noted that he had received letter and notice dismissing him as CECM on 7th February, 2020 save that he notes that there was an accident between his vehicle and motorcycle rider who died together two others; that he had verbally informed the 1st respondent about his trip to Taita Taveta County on 3rd January, 2020. He applied for imprests for the trip but the County Treasury did not have money at the time but he decided to proceed with the visit without money since the benchmarking trip needed to be done.

The defence is that the petitioner proceeded on an authorised trip to Taita Taveta on 4th February, 2020 and on the way back had an accident along Kitui- Kibwezi road involving his official vehicle and a motorcycle rider and two passengers who died; the petitioner was an under performer and lazy in his office and following various warnings and complaints by members of the public with regard to his conduct the 1st respondent found it necessary to exercise powers under section 31 and 40 of the County Government Act and dismissed him from his position.

The defence was also that following the motor vehicle accident on 4th February, 2020 it was established that the petitioner and his driver were drunk at the time; they were arrested and charged at Kitui Law Courts where they pleaded guilty to dangerous driving and were fined KSh.185,000 and he was found to be a liability to the respondents.

On the first issue as to whether there are constitutional and legal rights which have been violated, the foundation of termination and release from duty through summary dismissal is the application of section 31(a) and (d) and 40(1) of the County Government Act and which provides as follows;

The governor—

ave such powers as may be necessary for the execution of the duties of the office of governor.

(a) may, despite section 40, dismiss a county executive committee member at any time, if the governor considers that it is appropriate or necessary to do so;

(b) ...

(c) ...

(d) shall hIn this regard, section 40 (1) of the County Government Act provides as follows;

Removal of member of executive committee

(1) Subject to subsection (2), the Governor may remove a member of the county executive committee from office on any of the following grounds—

(a) incompetence;

(b) abuse of office;

(c) gross misconduct;

(d) failure, without reasonable excuse, or written authority of the governor, to attend three consecutive meetings of the county executive committee;

(e) physical or mental incapacity rendering the executive committee member incapable of performing the duties of that office; or

(f) gross violation of the Constitution or any other law.

Starting with the application of section 40(1) of the County Government Act, the application of this part of the law is subject to sub-section (2) thereof. In that a governor can only dismiss a member of a County Executive Committee from office on any specified ground following a resolution by the County Assembly pursuant to application of section 40(2) of the County Government Act whereas Under section 31(a), a Governor could dismiss a CECM on her own motion at any time if she considered it appropriate and necessary to do so but qualified to the extent that that power and discretion to release from duty could only be exercised reasonably and not arbitrarily.

In the case of **County Government of Nyeri & another v Cecilia Wangechi Ndungu [2015] eKLR** the Court of Appeal held that;

by virtue of the fact that a Governor ought to exercise his powers for the public good he should not act on selfish motives but for the benefit of his/her county. We find that the reasons for exercising the said power ought to be valid and compelling and will depend on the circumstances of each case. Consequently, the power to dismiss a member of the County Executive is qualified to the extent that the same ought to be for the benefit of the County and in accordance to the principles of devolution as set out herein above. ...

whereas the governor can only apply the provisions of section 40(1) of the County Government Act upon a resolution from the County Assembly, the governor can only apply the provisions of section 31(a) and (d) where appropriate or necessary to do so.

In the case of **County Government of Garissa & another v Idriss Aden Mukhtar & 2 others [2020] eKLR** the court held that;

If Section 31(a) of the County Government Act was to be interpreted as giving the Governor unfettered discretion to dismiss a county executive member at any time, if he, the Governor, considers it appropriate or necessary to do so, the yardstick would be personal and without transparency or accountability and this would be contrary to the principles and values espoused in the Constitution...

What the law under section 31(a) of the County Government Act contemplates that outline in the case of **County Government of Nyeri & another v Cecilia Wangechi Ndungu [2015] eKLR**;

... Section 31 (a) grants power to a Governor to dismiss a member of the County Executive Committee at any time, that is, at his pleasure. However, we find that the said power is qualified to the extent that he can only exercise the same reasonably and not arbitrarily or capriciously. Why do we say so?

Firstly, By dint of Article 179(1) of the Constitution and Section 34 of the County Governments Act the executive authority of a County is vested in the County Executive Committee. The County Executive Committee comprises of the Governor, Deputy Governor, members of the County Executive Committee who are appointed by the Governor. The members of the County Executive Committee assist the Governor to carry out his mandate under the law. It is the Governor who assigns to every member of the County Executive Committee responsibility to ensure the discharge of any function in the County. This is the reason why the County Executive Committee members are individually and collectively accountable to the Governor in the exercise of their powers and performance of their duties and responsibilities. (See Article 179 (6) of the Constitution and Section 39 of the County Governments Act.) A County Executive Committee member is the Governor's right hand in his/her respective office. Hence the Governor has to have confidence in the County Executive Committee member. Where such confidence is lost the Governor ought to have the capability of removing such a member without undue delay so as to enable the County Executive Committee to function for the benefit of the County.

Secondly, Section 31 (a) provides that a Governor may dismiss a County Executive Committee member at any time, if he/she considers that it is appropriate or necessary to do so. We find that the provision places an obligation on the Governor to exercise the said power only when necessary or appropriate. In our view this entails reasonableness on the part of the Governor in exercising this power. In Dunsmuir vs- New Brunswick (supra) the Supreme Court while discussing reasonableness observed:-

?47. Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness; certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions.A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.?

Further, by virtue of the fact that a Governor ought to exercise his powers for the public good he should not act on selfish motives but for the benefit of his/her county. We find that the reasons for exercising the said power ought to be valid and compelling and will depend on the circumstances of each case. Consequently, the power to dismiss a member of the County Executive is qualified to the extent that the same ought to be for the benefit of the County and in accordance to the principles of devolution as set out herein above

In this case, the petitioner was issued with memo by the County Secretary on 6th February, 2020 following a vehicle accident on 4th February, 2020 and even before the court respond and give his defences, if any, the next day on 7th February, 2020 he was issued with notice releasing him from duty with immediate effect.

The 1st respondent cited that there were several communications to the petitioner with regard to the performance of his duties. There is complaint made by MKM Artisanal Mining group to which the petitioner asserts that the matter has since been settled.

Section 45(2)(5)(e) of the Employment Act, 2007 allow the court to go back on the work record and particularly where there is a warning issued to the employee. Such is relevant herein particularly noting the responses made by the petitioner in this regard.

Further, the petitioner does not deny the particulars made with regard to the accident which occurred on 4th February, 2020 save that there is no evidence that he was charged and found liable. As this was his official vehicle, for the purpose of employment and labour relations, as the responsible officer, the circumstances leading to the accident were for him to give a defence. he opted to blame the driver.

Of utmost concern is that the travel was not authorised by the respondents. The petitioner response was that the trip had been verbally

authorised by the 1st respondent on 3rd January, 2020. He has gone out of his way to submit communication with various officers with regard to the travel to Taita Taveta but the issue in question which he failed to address was that the travel was not authorised by his supervisor, the 1st respondent.

These matters existing, before the 1st respondent issued the release of the petitioner on 7th February, 2020 she ought to have accorded the petitioner a fair chance to defend himself on these allegation and then form a reasonable case for the summary dismissal or a warning or as the case maybe. To act as done herein was arbitrary, unfair and without due process. Despite the existence of various matters facing the petitioner, due process was imperative.

On the respondent's application of section 31(a) of the County Government Act, the fundamental principle for the court to determine is that the reasons for dismissal determine whether a dismissal has been exercised reasonably, and the reasons given are valid and compelling.

The above taken into account court is bound to address in the final orders.

As noted above, the 1st respondent in releasing the petitioner from duty applied section 40(1) of the County Government Act which requires a resolution by the County Assembly. No resolution is cited in the entirety of these proceedings. The application of section 40(1) of the Act is of no consequence.

The respondents have also submitted that there was application of section 44, 41 and 43 of the Employment Act, 2007.

Whereas section 44 of the Employment Act, 2007 allows an employer to terminate employment by summary dismissal, such provisions are subject to application of section 41(2) of the Act. the employee must be issued with notice and allowed a chance for a hearing to give his defences in the presence of another employee of his choice. There is no evidence of compliance to these provisions and where the respondents were faced with circumstances that made it impossible to accord the petitioner the legal protection under section 41(2) of the Act, such exceptional circumstances have not been demonstrated to this court.

Section 41 of the Employment Act, 2007 is couched in mandatory terms. An employee must be given a hearing before termination of employment where there is alleged poor performance, incompetence or incapacity or any misconduct. a notice must issue and allow the employee to attend to give his defences. There is no evidence that the petitioner was accorded these protections of section 41 of the Act.

Section 43 of the Employment Act, 2007 allow an employer to terminate employment for a valid reason(s) save the employee must be accorded the due process of section 35 and 41 of the Act.

As noted above, the court finds no evidence that the respondents have complied with any provisions of the Employment Act, 2007. Such amounts to unfair termination of employment pursuant to section 45 of the Act and in this regard, the remedies under section 49 of the Act are available to the petitioner.

These failure to comply with the law heavily impinge on the constitutional protections due to the petitioner pursuant to articles 10, 47, 41, 232 and 259 of the constitution with regard to the values and principles thereof; the fair administrative action to be given a hearing before an adverse action is taken; fair labour relations and adherence to the rule of law.

On the remedies sought, the findings above that the respondent failed to adhere to the law and due process; the petitioner claiming in employment for damages; taking into account his conduct and the application of section 45(5)(e) of the Employment Act, 2007 read together with section 49 of the Act, his last salary was Ksh.262,500 a compensation of three (3) months is hereby found appropriate. Total due in this regard is ksh.787,500.

On the claim for damages pursuant to article 23 of the Constitution, 2010; the compensation awarded above is found sufficient.

Where there is no due process leading to termination of employment, notice pay is due pursuant to section 35 of the Employment Act, 2007 for one month gross salary. On the findings above, the court awards the claimant notice pay at ksh.262,500 in notice pay.

The claim for medical cover for self and family is made in the context that the petitioner expected to work until the year 2022 upon the appointment of a new executive. This is futuristic. The petitioner has not pleaded or claimed in reinstatement. To peg any benefit(s) to the term of the 1st respondent without offering his services to the 2nd respondent is without any good justification. See **D.K. Njagi**

Marete versus Teachers Service Commission [2013] eKLR.

The monthly standing allowance, credit card allowance, filed out of station allowances are equally tied to an expectation that the petitioner would work until the year 2022. The petitioner has since been released from his duties. The expected payments ceased with such release.

On the claim for payment of a gratuity, there were no submissions as to why this is sought in the nature stated. The payment of gratuity must be based on the contract of employment, a private treaty, agreement of policy of the employer. It does not apply in a general or blanket manner. The court finds no justification for this claim.

On the claim for leave days, the petitioner's case was that he never took his annual leave for 15 days in the year 2019 and which amounts to a total of 90 leave days until the end of his term in the year 2022. For time worked and up until 7th February, 2020 the petitioner is entitled to his annual leave. On the outstanding 15 leave days in the year 2019 and the date such days were due not stated, the petitioner shall return to the shop floor and have his due leave days tabulated ending 7th February, 2020. Such leave pay should be based on the basic and not the

gross salary.

On the issue of costs, as the petition partly successful; section 12(4) of the Employment and Labour Relations Court Act, 2011 put into account, each party shall bear own costs.

Accordingly, judgement is hereby entered for the petitioner against the respondents in the following terms;

(a) Compensation awarded at ksh.787,500;

(b) Notice pay at ksh.262,500; and

(c) Leave days shall be tabulated at the shop floor for the period ending 7th February, 2020.

DELIVERED IN OPEN COURT AT NAIROBI THIS 28TH DAY OF JANUARY, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistance: Okodoi

..... and

¹ Such provisions are non-existent. Employment and Labour Relations Act, 2011 ends at section 35.