



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT

AT NAIROBI

PETITION NUMBER 16 OF 2015

[CONSOLIDATED WITH E&LRC CAUSE NO. 722 OF 2015]

IN THE MATTER OF ARTICLE 22[1] AND 23 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA; AND,

IN THE MATTER OF ALLEGED CONTRAVENTION OF THE CONSTITUTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLE 3[1] 10, 20[1] 27,28,29[d], 35[1] AND [2] 41[1], 43, 47, 48, 50, 73 [1],73[2][b] AND 79 AS READ TOGETHER WITH ARTICLE 250 [1] OF THE CONSTITUTION OF THE REPUBLIC OF KENYA; AND,

IN THE MATTER OF VIOLATION OF EMPLOYMENT RIGHTS PROTECTED BY SECTIONS 5,35[4],41,43,45,46,47,49, AND 50 OF THE EMPLOYMENT ACT 2007;

BETWEEN

JANE WANJA MUTHAURA.....PETITIONER

VERSUS

ETHICS AND ANTI-CORRUPTION COMMISSION..... RESPONDENT

*Rika J*

*Court Assistant: Emmanuel Kiprono*

*Wangira Okoba & Company Advocates, for the Petitioner*

*Culent Lunyolo, Advocate for the Respondent*

JUDGMENT

**Petition.**

1. This Petition was filed on 16<sup>th</sup> February 2015. The Petitioner states, and testified on 11<sup>th</sup> August 2017 and 18<sup>th</sup> February 2021 that, she was employed by Respondent's Precursor, Kenya Anti-Corruption Commission [KACC] as the Principal Officer [Finance & Accounts] on 18<sup>th</sup> April 2006.
2. She first earned Kshs. 331,714, as basic monthly salary, house allowance of Kshs. 50,000, transport allowance at Kshs, 37,000, and was entitled to annual leave allowance of Kshs. 23,000 and gratuity of 31% of her monthly basic salary, for every month served, payable at the end of the contract.
3. Her contract was renewed for a further 4 years with effect from 17<sup>th</sup> April 2010. Her basic salary was adjusted from Kshs. 331,714 monthly, to Kshs. 384,000.
4. A new law, Ethics and Anti-Corruption Act No. 22 of 2011 repealed the previous law, Anti-Corruption and Economic Crimes Act, 2003. The Director and Assistant Directors of the Commission were relieved of their duties by operation of the law. The Petitioner was appointed

to coordinate and oversee the Commission's affairs, during the transition, in a letter dated 8<sup>th</sup> September 2011 from the Kenya Anti-Corruption Commission Advisory Board. Outgoing Director, Professor P.L.O Lumumba, handed over to the Petitioner.

5. She was appointed in an acting capacity on 2<sup>nd</sup> December 2011, as the Secretary to the newly created Ethics and Anti-Corruption Commission [EACC].

6. Under the same law, the term of the Advisory Board came to an end on 5<sup>th</sup> December 2011, and the outgoing Board appointed the Petitioner to coordinate and oversee the affairs and all operations, until new Commissioners were appointed. She looked after the affairs of the entire Commission. She was hence the Acting Chief Executive Officer of the Commission, between 2<sup>nd</sup> December 2011 and 27<sup>th</sup> September 2012 when the first 2 Commissioners were appointed under the new legal regime.

7. She discharged her acting role faithfully, and on 18<sup>th</sup> January 2012, was appointed as the Accounting Officer by the Permanent Secretary, Treasury in the Office of the Deputy Prime Minister and Ministry of Finance

8. The Petitioner was advised by the Human Resources Department in a letter dated 1<sup>st</sup> February 2021, that she was entitled to an acting allowance, in accordance with clause 7.5 of the Commission's Governance Manual. This allowance was processed and paid.

9. She was further advised that in the absence of Director of Finance and Administration, she would oversee the role and was therefore entitled to a special duty allowance, in accordance with Clause 7.6 of the Respondent's Governance Manual. This was applicable from the date of appointment to this role, 8<sup>th</sup> September 2011 to 1<sup>st</sup> December 2011. The allowance was paid.

10. After the Kenya Anti-Corruption Commission was abolished on 5<sup>th</sup> September 2011, the Advisory Board appointed a number of Officers to coordinate and oversee the functions of newly formed Ethics and Ant-Corruption Commission. All the 4 Officers so appointed, were entitled to acting and special duty allowances.

11. 2 Commissioners Irene Cheptoo Keino and Pro. Jane Kerubo Onsongo were appointed on 27<sup>th</sup> September 2012. On 1<sup>st</sup> October 2012, the Petitioner was advised to hand over Finance and Administration Directorate to Peter Wambua, an Accountant.

12. The Petitioner was substantively a Principal Officer and her Assistant was a Senior Accountant. By handing over to Wambua, she essentially handed over to a junior Officer. Despite being the Acting CEO, she did not attend any meeting by the new Commissioners, where these instructions issued.

13. On 15<sup>th</sup> October 2012, 14 days after the 2 Commissioners arrived, the Petitioner was advised that she had received allowances above what was advised by the Permanent Secretary in charge of the Public Service

14. The Permanent Secretary had earlier advised on the rates of acting allowance. However, this was reversed upon realization that the Respondent is an Independent Commission. Allowances reverted to Respondent's Commission Remuneration Policy.

15. Despite the reversion, the Respondent stopped the Petitioner's allowances alone, effective 1<sup>st</sup> October 2012. The rest of Coordinators continued to receive allowances.

16. On 11<sup>th</sup> December 2012, the new Commissioners advised the Petitioner that they had appointed Abdi Ahmed Mohamud as the Acting Secretary/CEO beginning 14<sup>th</sup> December 2012. The Petitioner was advised to go back to her role as the Principal Officer, Finance and Accounts

17. This twist of events, meant the Petitioner was now under Peter Wambua, her junior, who had earlier been placed in the position of Coordinator, Finance and Administration. She felt humiliated and mentally tortured.

18. The Court had ordered in Petition Number 334 of 2012, ***African Centre for International Youth Exchange [ACIYE] & 2 others v. Ethics & Anti-Corruption Commission & another [2012] e-KLR***, that the Petitioner is sworn in as the Acting CEO, until a substantive holder was appointed. The appointment of Mohamud was meant to render the order of the High Court valueless. The Petitioner complied and handed over her role to Mohamud. Mohamud was a junior Officer.

19. The Petitioner applied for the position of Deputy Secretary CEO/ Deputy CEO Support Services, was shortlisted, but not taken in.

20. A new Secretary/ CEO was appointed and sworn in on 21<sup>st</sup> January 2013. On 28<sup>th</sup> March 2013 barely 1 ½ months since appointment, the CEO terminated Petitioner's contract. There was no notice, and reason or reasons, justifying termination. There was no letter to show cause, no warning or disciplinary hearing. The Petitioner was asked to hand over to Ronald Wanyama. To justify its decision, the Respondent took the Petitioner through a vetting process. She was not provided with copies of the vetting findings, and the exercise was adjudged unlawful, as per the High Court order requiring the Claimant is sworn in.

21. The 2 new Commissioners took it upon themselves to discharge the full role of the Commission despite the fact that the Commission was not fully constituted. Mohamud served for only a month, the position being substantively filled after this. The Petitioner's removal was therefore ill-motivated and discriminative

22. The Petitioner was advised on termination that she would receive all terminal dues. None was received by the time she presented her

Petition.

23. It is the position of the Petitioner that termination violated her right to fair labour practices under Article 41 of the Constitution; right to fair administrative action under Article 47; right to fair hearing under Article 25 and 50 of the Constitution of Kenya; the principle of natural justice; right not to be discriminated against under Article 27 of the Constitution and Section 5 of the Employment Act; and was in disregard of Sections 41, 45 and 49 of the Employment Act.

24. She prays for Judgment against the Respondent as follows: -

a) Declaration that her fundamental rights under Article 10, 5[c], 27, 41[1], 47[1], [2] and 50[1] of the Constitution, have been grossly infringed and violated by the Respondent's decision to dismiss the Petitioner from Ethics and Anti-Corruption Commission [EACC].

b) Declaration that the Petitioner was discriminated against contrary to Article 27 of the Constitution and Section 5 of the Employment Act.

c) Declaration that the 2 Commissioners did not have the powers to remove the Petitioner from her acting role as the Secretary/ CEO of the Commission before a Substantive Holder was appointed.

d) Declaration that the Respondent was unfair, and illegally withheld the Petitioner's terminal dues, contrary to Sections 36 and 49 of the Employment Act.

e) Declaration that termination of her employment was both in breach of contract, and contrary to Sections 41 and 45 of the Employment Act No. 11, which binds the Commission in terms of Section 3[1] and 3 therein.

f) Declaration that the process of terminating the Petitioner from her employment was unfair, un-procedural and illegal contrary to the mandatory requirements of the Employment Act, 2007.

g) Payment of lost acting allowance as the Coordinator of Finance and Administration Directorate [Kshs. 650,000 -384,000] x 6 months, at Kshs. 1,596,000.

h) 3 months' salary in lieu of notice at Kshs. 471,000 a month, total Kshs. 1,413,000.

i) Service gratuity at 31% of Kshs. 384,000 for 12 months, April 2011 to March 2012, at Kshs. 1,428,480.

j) Acting allowance October 2012 to December 2012 [Kshs. 975,000 -384,000], at Kshs. 1,391,805.

k) Lost acting allowance for 11<sup>th</sup> December 2012 to 21<sup>st</sup> January 2013 [41 days, Kshs. 975,000 – Kshs. 384,000] x 41/30 months = Kshs. 809,670.

l) Responsibility allowance as Acting CEO for 15 months, 8<sup>th</sup> September 2011 to 11<sup>th</sup> December 2011 at Kshs. 150,000 monthly, – total Kshs. 2,250,000.

m) Leave pay for 18 days at Kshs. 282,000.

n) 2 days worked in April 2013 at Kshs. 31,400.

Sub-total ...Kshs. 9,202,955.

o) 12 months' salary left on her contract from April 2013 to March 2014, at Kshs. 471,000 per month, totaling Kshs. 5,652,000.

p) Service gratuity at 31% of Kshs. 384,000 for 12 months at Kshs. 1,428,480. [*Repeated under paragraph [i] above*].

q) Annual leave allowance for the lost year at Kshs. 23,000.

Sub-total...Kshs. 7,103,480.

r) Damages for unfair and un-procedural termination at Kshs. 471,000 x 12 months, total Kshs. 5,652,000.

Total Claim ...Kshs. 21,958,435.

s) The subtotal of Kshs. 9,202,955 to attract interest from the date of termination.

t) The subtotal of Kshs. 7,103,480, and compensation of Kshs. 5,652,000 to attract interest from the date of Judgment till payment is made in full.

u) Costs to the Petitioner.

v) Any further or better orders.

25. On cross-examination the Petitioner told the Court that she was initially employed as Principal Finance and Accounts Officer for a renewable period of 4 years. Her contract had a clause on termination by notice of 3 months, or payment of 3 months' salary in lieu thereof. She worked for a total of 7 years for the Respondent. She was there during the constitutional transition. There were changes. Offices were abolished. Some directorates were abolished. The Advisory Board remained.

26. The Petitioner was instructed by the Board Chair to remain and coordinate the Respondent. The Board did not mention allowances. It asked for advice from the Public Service Ministry. She was not sure that the Board was aware of the Governance Manual. KACC came to an end. It was important to consult widely, the Governance Manual notwithstanding. The Advisory Board had knowledge of the Governance Manual. The Position of Respondent's CEO is senior. The letters of 5<sup>th</sup> December 2011 and 2<sup>nd</sup> December 2011 did not give the Petitioner terms and conditions of the acting role. They were silent of payable allowances.

27. The Advisory Board sought the advice of the Permanent Secretary through a letter dated 6<sup>th</sup> October 2011, on allowances to be paid to the 4 Coordinators. There was no response by the time the Advisory Board left. The Petitioner wrote a reminder to the Permanent Secretary, Public Service on 17<sup>th</sup> January 2012. The Ministry advised that the 4 Officers are paid 10% of their basic salary as acting allowance.

28. The Petitioner wrote to the Permanent Secretary on 19<sup>th</sup> January 2012, advising that the Respondent had a Governance Manual, regulating payment of acting and special duty allowances. The Respondent had raised a complaint that the Petitioner was overpaid. This was on 30<sup>th</sup> October 2013, after the Petitioner was out of service. She left on 28<sup>th</sup> March 2013. There were internal mechanisms for payment of allowances. There was legal opinion on the subject from Respondent's legal department. Legal opinion did not go into application of the Governance Manual, but applicability of the special duty allowance. It was the opinion of the legal team that allowances must be approved by the Acting Director in writing. Director and Assistant Directors had been done away with. These offices had been abolished and their holders left the Respondent.

29. The Petitioner was paid special duty allowance between 8<sup>th</sup> September 2011 to 8<sup>th</sup> December 2011 at Kshs. 197,000. She was in Accounts and knew what the Director earned. Director earned a basic salary of Kshs. 975,000 monthly. The Petitioner earned Kshs. 384,000. She was paid 1/3 of her salary as special duty allowance. She was paid a total of Kshs. 591,000 monthly, based on the figures above. The acting allowance was paid December 2011 to September 2012. The Permanent Secretary had advised a rate of 10% of basic pay as special allowance. The Ministry relied on Public Service Guidelines. The Petitioner's letter of 19<sup>th</sup> January 2012 was to the effect that the Governance Manual should apply. The Petitioner's letter was placed before the Secretary to the Cabinet Ambassador Muthaura. There was advice that the matter be taken before the Salaries and Remuneration Commission. The Petitioner denied that she relied on communication which was favourable to her, ignoring that which did not favour her. All letters must be read together.

30. The Petitioner applied for the position of Deputy CEO but was not appointed. It was not her right to be appointed. It was her legitimate expectation. She was advised to hand over to a junior officer after the arrival of the 2 Commissioners. She disputed his qualifications. It is not normal to have seniors being supervised by their juniors. The Respondent had an organogram. The Respondent received a letter dated 30<sup>th</sup> October 2013, stating that she was overpaid. There was a Court Order, directing the Respondent to swear in the Petitioner as the Acting CEO. She did not take any action after the Order was not complied with. The Respondent had power to appoint Acting CEO, but needed to give reason for its decision to remove the Petitioner. She did not cease to be Principal Finance and Accounts Officer. She had a dual role on appointment as the Acting CEO. She concentrated on being a housewife and part consultancy, after she left employment.

31. Redirected, the Petitioner told the Court that she joined the Respondent in April 2006. Her 1<sup>st</sup> contract expired in 2010. She got a renewal to run from April 2010 to 2014. The new Act came into operation in 2011. She was instructed to take over by the Advisory Board and coordinate. No designation was given to her. She was given authority to act, running the entire Commission as CEO/ Secretary. 3 others were appointed to run the Directorates. They were paid special allowances. It was recommended the Governance Manual guides the process. The Petitioner was not called for any disciplinary hearing. She was just handed a letter of termination. She did not receive allowances which were not due to her. She was not advised on 10% basic salary as acting allowance. By the time recommendation to take the matter to the SRC came, the Respondent had already received advice from the Ministry, to apply the Governance Manual. The Petitioner was not paid her gratuity. There was no explanation for non-payment. The Petitioner prays the Court to allow her Petition and dismiss the Claim filed by the Respondent.

#### **Claim by the Respondent.**

32. On 4<sup>th</sup> May 2015, some 3 months after the Petition was filed, the Respondent filed Cause Number 722 of 2015 against the Petitioner, over the same subject matter.

33. The Claim was consolidated with the Petition herein, through an order of the Court issued on 8<sup>th</sup> June 2015. Why did not the Respondent file a Counter-Petition instead of convoluting the proceedings with a fresh Claim?

34. The Respondent repeats the employment history between the Parties, in its Claim. Its position is that the Petitioner received Kshs. 5,862,895 irregularly and/ or illegally, as acting allowance. She received special duty allowance. The Petitioner did so, relying on regulations 7.5 and 7.6 of the Governance Manual, which was not applicable.

35. The Respondent explains that under the transitional mechanism, the Advisory Board was to remain in place for a period of 90 days, or until the new Commission was fully constituted, whichever came earlier. The Advisory Board designated the Petitioner to oversee Respondent's operations during transition. The letter of appointment advised the Petitioner that, "*your terms of service for the time being*

*shall remain the same. ‘‘*

36. The mandate of the Advisory Board came to an end on 5<sup>th</sup> December 2011. It was resolved to hand over operations to the Petitioner. This did not amount to appointing her as the Acting CEO. Her position was encouraged by Secretary to the Cabinet and Head of Public Service Ambassador Francis Muthaura, who purported to appoint the Petitioner as Acting CEO. Muthaura however, did not have such powers under the Constitution and Statute, and appointment was null and void. The Petitioner was aware that she was not appointed as the Acting CEO.

37. She received backdated allowances based on the Governance Manual: -

a) Special duty allowance of Kshs. 197,000 monthly, from 5<sup>th</sup> September 2011 to 2<sup>nd</sup> December 2011.

b) Acting allowance of Kshs. 591, 000 per month from 3<sup>rd</sup> December 2011 to September 2012 when payments were stopped by the Respondent.

38. The payments were not in conformity with the Governance Manual which stipulated that: -

a) The higher post must have a salary scale assigned to it and must therefore be in existent, at the time of appointment.

b) The appointment to act in higher post must be in writing.

c) The payment must be recommended by the respective Assistant Director of the Directorate in which the affected Officer is situated.

d) The payment must be authorized by the Director.

39. The Director's and Assistant Director's positions had been abolished and payment under Regulation 7.5 and 7.6 of the Governance Manual would not apply. The Petitioner was aware about this but continued to receive these allowances. Auditor-General's Report for the year ending June 2013, confirmed that she received these irregular allowances. She received total allowances in the sum of Kshs. 5,862,895.90. She was entitled upon termination to 3 months' salary in notice pay, gratuity and salary for days worked all at Kshs. 2,850,216. This was offset against the amount received illegally, leaving a sum of Kshs. 3,012,976, which the Respondent seeks from the Petitioner.

40. Relying on the position adopted in her Petition above, the Petitioner asks the Court to decline the Countersuit.

**Evidence for the Respondent in the Petition & Claimant in the Claim.**

41. Respondent's Accountant, Peter Wambua and Assistant Director Human Resource Joy Gacheri Bundi, both gave evidence for the Respondent on 18<sup>th</sup> February 2021, bringing the hearing to a close.

42. Wambua testified that he was aware about the contents of the Consolidated Petition and the Claim He adopted his Witness Statement dated 4<sup>th</sup> August 2017 on record, underscoring that the Governance Manual did not apply, the offices of the Director and Assistant Directors having been abolished. Wambua was handed an acting role, and paid 10% of his basic monthly salary as acting allowance. The Petitioner worked under Wambua after she was moved from overseeing the operations of the Respondent. Wambua did not humiliate her.

43. Cross-examined, Wambua told the Court that 10% of basic salary as acting allowance was based on the advice of Directorate of Personnel Management. It was in a letter dated 17<sup>th</sup> January 2012. There were other letters on the subject. The same Permanent Secretary Titus Ndambuki advised the Respondent to apply the Governance Manual.

44. The Petitioner was Wambua's boss initially. She was Principal Finance Officer. Wambua was an Accountant under her. After the Commissioners left, the Petitioner was given authority to coordinate the whole Organization. Ambassador Muthaura gave her authority to act as the CEO. Wambua did not know that the High Court ordered she is sworn in as the Acting CEO pending appointment of the Substantive CEO. Her acting role was taken away. She returned to Finance, now under Wambua. This was normal during transition. She was eventually dismissed. Her contract had already been renewed. She was not paid her gratuity. Wambua was not a Legal Officer and would not know if the Petitioner's benefits could be withheld.

45. Redirected, Wambua told the Court that the rate of 10% of basic salary as acting allowance came from Directorate of Personnel Management. Ambassador Muthaura also advised that the matter is taken to the Salaries and Remuneration Commission.

46. Joy Gacheri Bundi told the Court she had worked for 14 years for the Respondent, at the time she gave evidence. She adopted her Witness Statement, and Documents on record as exhibits 1-26, and Supplementary Documents as exhibits 27-35.

47. The Petitioner's contract was not unfairly terminated. It was in accordance with termination clause. Her dues were withheld because of irregular allowances paid to her. These payments were not in accordance with the law. Director's and Assistant Directors' offices had been abolished. Governance Manual was inapplicable because the Director was to approve acting role and allowances in writing.

48. The letter of Ambassador Muthaura appointing her could not stand, because it was not in accordance with the law. The Petitioner wrote to various persons disputing 10% basic salary as the acting allowance. She wrote on 19<sup>th</sup> February 2012 to Ambassador Muthaura, Joseph Kinyua and Titus Ndambuki. The Response was from Francis Kimemia, Acting Head of Public Service, Ambassador Muthaura having left

office. Kimemia advised that Salaries and Remuneration Commission should handle the matter. The Respondent's legal department also gave advice which the Petitioner disregarded. She relied on the Governance Manual. Allowance was meant to compensate for the acting role. It was a percentage of the basic monthly salary. In this case, the allowance was higher than basic salary. Responsibility allowance was not in the Manual. The Petitioner should pay back to the Respondent, what was paid irregularly.

49. Bundi told the Court on cross-examination that the law does not allow withholding of pension. Gratuity is contractual and can be withheld. RBA Act prohibits withholding of pension.

50. The Petitioner was not heard. There was vetting of all Officers. Bundi did not know whether vetting was declared null by the Court. She was aware it was legally challenged in Court. There were no charges against the Petitioner. All she received was a letter of termination. 10% of basic salary was based on the advice of the Ministry of State for Public Service. The Governance Manual had not been suspended, but positions were abolished. Commission's operations did not cease. The Claimant coordinated operations. She was given a letter to coordinate. She was playing the role of Director. The standard practice is that acting allowance cannot be more than the basic salary. Titus Ndambuki authorized use of the Governance Manual. Bundi did not know if advice from the Attorney-General was sought. Several Officers received acting allowances. Several refunded on demand. Bundi did not have the records. Olga Sewe [now Hon. Lady Justice] was one of the Officers who acted. Bundi did not know if she made any refund.

### Submissions.

51. **The Petitioner submits** that she was entitled to acting allowances under clause 7.5 of the Governance Manual. The Respondent wrote to her on 1<sup>st</sup> February 2012 informing her about this allowance. It also advised that she was entitled to special duty allowance, following her appointment by the Advisory Board to oversee Finance and Administration Directorate from 8<sup>th</sup> September 2011 to 1<sup>st</sup> December 2011.

52. The Petitioner submits that the **High Court, in *Petition 334 of 2012*** [cited above], ordered that the Petitioner is sworn in, pending the appointment of the Substantive CEO. The Respondent hurriedly appointed another person to take up the acting position, when it was supposed to be administering the oath of office upon the Petitioner.

53. The Substantive CEO was sworn in on 21<sup>st</sup> January 2013. On 28<sup>th</sup> March 2013, he terminated the Petitioner's contract. The Commissioners allegedly vetted the Petitioner despite the process having been declared unlawful by the Court. The Commission had not properly been constituted at the time of termination.

54. The Petitioner submits that she had legitimate expectation to see her contract through to the year 2014. Relying on ***Pravin Bowry v. Ethics and Anti-Corruption Commission [2013] e-KLR*** and ***Communication Commission of Kenya and 5 Others v. Royal Media Services and 5 Others [SC Petition Nos. 14,14A,14B,14C of 2014]***, she submits that legitimate expectation is founded upon a promise or practice by a Public Authority, that it is expected to fulfil the expectation.

55. She submits that termination was without notice, and contrary to Section 41 of the Employment Act. She submits further that in Court of Appeal decision, ***Ethics and Anti-Corruption Commission v. Nicholas Mwenda Mtwaruchiu and 8 Others [2018] e-KLR***, it was established that 2 Commissioners did not legally constitute the required quorum for purposes of discharging the mandate of the Commission. The required quorum was 3 Commissioners. Action based on resolve of the 2 Commissioners was a nullity in law. The demotion of the Petitioner as Acting CEO and removal as Coordinator Finance and Administration, by the 2 freshly appointed Commissioners, fell within the bracket of nullities identified in the above decision.

56. **The Respondent submits** that the Petitioner paid to herself special duty allowance of Kshs. 197,000 per month with effect from 5<sup>th</sup> September 2011 to 2<sup>nd</sup> December 2011. She paid herself acting allowance of Kshs. 591,000 per month, from 3<sup>rd</sup> December 2011 to September 2012, when the payments were stopped by the Respondent.

57. It is submitted that the Petitioner believed herself to be the Acting CEO, and relied on the Respondent's Governance Manual, Regulations 7.5 and 7.6 respectively.

58. Regulation 7.5 required the acting allowance to be approved by the Director, upon the recommendation of the respective Assistant Director. Special duty allowance was to have similar approval and recommendation. Payment in either case was not tenable under the Governance Manual. The Ministry of Public Service advised that the 4 Officers appointed to perform the duties of Directors and Assistant Directors could be paid special duty allowance at 10% of their basic salaries. The Auditor-General in the Report for the year ended June 2013 confirmed that the payments were irregular.

59. Termination of the Petitioner's contract was in accordance with her terms and conditions of employment. Clause 2 [c] provided for termination on notice of 3 months, or payment of 3 months' salary. This is in line with Section 35 of the Employment Act. In ***Joseph Muthama Ndambuki and 4 others v. Delmonte [K] Limited and Kenfreight [E.A.] Limited v. Benson K. Nguti [2019] e-KLR***, the Courts upheld the right of an Employer to terminate the Employee's contract through a written notice, or pay in lieu of notice. The Respondent submits that termination at the will of the Employer, is accepted under employment law.

60. The Respondent argues that the Petitioner was not discriminated against. It was within the managerial prerogative of the 2 Commissioners to remove the Petitioner from the position of Acting CEO. The Petitioner had no right to remain as the Acting CEO, or Coordinator. Her allegations against her colleagues are unfounded.

61. The amount of Kshs. 2,850,261 due to the Petitioner was offset against what she owed the Respondent. In ***Jane Jerotich Sirma v. Postal Corporation of Kenya [2020] e-KLR***, the Court held that all lawful dues owing to the Employer must be taken into account at the point the Employee receives his terminal dues. Further reliance on the subject is found in ***Herman Musabi v Teachers Service Commission and the***

**Attorney-General [2018] e-KLR.** where it was held that the Employment Act sanctions deductions of any amounts paid to the Employee in error.

62. The issues as identified by the Parties in their Submissions, and understood by the Court are: -

- a. Whether acting and special duty allowances were payable to the Petitioner, and whether they were paid regularly.
- b. Whether the Petitioner owes the Respondent the sum claimed in Cause No. 722 of 2015.
- c. Whether termination of the Petitioner's contract was unfair and unlawful.
- d. Whether the Petitioner's constitutional rights were violated.
- e. Whether the respective Parties merit the remedies sought.

**The Court Finds:** -

63. The Petitioner was employed by the defunct Kenya Anti-Corruption Commission on 18<sup>th</sup> April 2006, as Principal Officer Finance and Accounts.

64. The contract was for 4 years ending in 2010. It was renewed for another 4 years on 17<sup>th</sup> February 2010, to lapse in 2014.

65. The Ethics and Anti-Corruption Commission Act No. 22 of 2011 was enacted in 2011 pursuant to Article 79 of the Constitution of 2010. The Act established the Respondent in this Petition.

66. The positions of Director and Assistant Director under Kenya Anti-Corruption Commission were done away with. The old Advisory Board was retained for a period of 90 days or until the new Commission was fully constituted.

67. The Principal Officers, in the absence of the Director and Assistant Directors, were the highest ranking in the remainder of the transition organogram.

68. The Advisory Board appointed the Petitioner in a letter dated 8<sup>th</sup> September 2011, to coordinate and oversee the operations of the Respondent. 3 other Principal Officers were appointed as Coordinators of Legal Services, Preventive Services and Investigation and Asset Tracing.

69. The term of the Advisory Board came to an end on 5<sup>th</sup> December 2011. The Petitioner was handed over the reins by the outgoing Advisory Board, assuming the role of the CEO. She oversaw the operations of the Respondent. She was appointed the Accounting Officer by the Permanent Secretary in the Treasury, for the year 2011 -2012, and reappointed on 6<sup>th</sup> July 2012 as Respondent's Accounting Officer for the year 2012-2013.

70. That the Petitioner acted as the CEO of the Respondent, was confirmed by the Court in ***African Centre for International Youth Exchange [ACIYE] and 2 Others v. Ethics and Anti-Corruption Commission & Another [2012] e-KLR.***

71. The Court in the above case found and held that: -

§ Ms. Muthaura [Petitioner] has been designated as the Accounting Officer by the Permanent Secretary to the Treasury, in accordance with Section 17 of the Government Financial Management Act, 2004.

§ The provisions of the Government Financial Management Act would continue to apply until the Commissioners and CEO were appointed.

§ The duties outlined in the appointment of Ms. Muthaura constituted the kind of duties that would be performed by the CEO to the Commission.

§ The Constitution under Article 259[3][b] recognizes that there could be State Officers in acting roles, during the transition period.

§ Jane Muthaura performed and continued to perform the functions of a State Officer, namely the CEO of the Respondent.

72. It cannot be disputed in the face of the findings in the Court above, that the Petitioner herein acted as the CEO of the Respondent. It cannot similarly be argued that she did not have authority, or that authority was flawed. The Court established that she had been appointed to act as the CEO of the Respondent and was Respondent's Accounting Officer.

73. Acting allowance was clearly payable. In the absence of a definitive transitional law on the amount to be paid as acting allowance, the Governance Manual would continue to apply, much the same way the Government Financial Management Act, 2004, was deemed to apply in the case of ***ACIYE*** cited above.

74. The 6<sup>th</sup> Schedule of the Constitution on Transitional and Consequential Provisions does not contemplate gaps in the transition period. Labour laws and instruments applicable in the transitioning institutions, would apply in the interim.

75. Clause 7.5 of the Governance Manual provided for acting allowance at the rate of full difference, between an Officer's salary and the minimum salary of the scale assigned to the higher post.

76. The minimum salary of the scale assigned to the CEO was uncontested, at Kshs. 975,000 monthly. The Claimant as Principal Officer earned basic salary of Kshs. 384,000. The Petitioner was paid a monthly acting allowance of Kshs. 591,000 legally, under the Governance Manual. The acting allowance outstripped her basic pay as Principal Officer, but this was not prohibited in the Governance Manual or any law cited by the Respondent. The huge acting allowance paid to the Petitioner reflected the chasm between what was earned by the CEO and the Principal Officers. It was not contrary to the law, the Petitioner having been appointed to act in the position of the CEO. The formula under the Governance Manual was complied with.

77. The clause required that she worked in acting capacity for at least 30 days, and that she would otherwise be qualified to work in the higher post. It is not argued by the Respondent that the Petitioner did not meet this standard.

78. The clause required further, that acting appointment would be in writing, having been approved by the Director upon the recommendation of the respective Assistant Director.

79. The Respondent repeatedly states that this part of clause 7.5 of the Governance Manual was not followed, making the payment of acting allowance irregular.

80. This argument again fails in understanding of the 6<sup>th</sup> Schedule to the Constitution. There was no Director and there were no Assistant Directors at the time of the acting appointment, to discharge the functions assigned to them, under clause 7.5. Appointment was in writing, as shown in the letters of the Advisory Board, Permanent Secretary Treasury and Head of Public Service. It was confirmed by the Court that the Petitioner discharged the functions of the CEO.

81. In *Ruth Muganda v. Kenya Anti-Corruption Commission [H.C.Misc. Application No 288 of 2012]*, the Court held that the transitional challenge required a purposive approach, in the spirit of the Constitution, to promote continuing and intended functions of the Commission throughout the transitional process as opposed to extinguishing its existence.

82. The Petitioner was acting in the place of the Director. She had authority to act from the Advisory Board, and Permanent Secretary in the Treasury. It was not possible to fulfil the requirement that Director and Assistant Director are involved in authorisation of the acting role. They were no longer in place, and the Petitioner was discharging their role in the transition.

**83. *The Court is satisfied that acting allowance was payable to the Petitioner, and was paid regularly.***

84. The same legal argument would apply to the special duty allowance. The facts justifying payment of special duty allowance are however different.

85. Special duty allowance fell under clause 7.6 of the Governance Manual. Appointment for special duty would be in writing. The rate was one-third of the difference between the Officer's substantive basic salary, and the minimum salary of the higher post. It was calculated and paid at Kshs. 197,000.

86. It is not disputed that the Petitioner was appointed by the Advisory Board, to oversee Finance and Administration Directorate. 3 other Principal Officers were appointed to oversee other Directorates. The Petitioner discharged special duty from 8<sup>th</sup> September 2011 to 1<sup>st</sup> December 2011. She was paid special duty allowance as was the other Coordinators.

87. The appointment by the Advisory Board to oversee the affairs of the Respondent was buttressed by a letter of appointment issued by the Head of the Public Service. Although ordinarily the Head of Public Service has no legal role in the running of the Respondent, as submitted by the Respondent, his letter came in the background of appointment already made by the Advisory Board. In a transitional phase, the Head of Public Service appears to have been concerned about the gaps that opened in the process, which would hamper the operations of the Respondent, and took action which was definitely not within his legal mandate, but which in the view of the Court did not affect the legitimacy of the acting appointment, conferred upon the Petitioner by the Permanent Secretary, Treasury and by the Advisory Board.

88. The Respondent through its Senior Human Resources Officer Mohammed Doo wrote to the Petitioner on 1<sup>st</sup> February 2012, advising that she was entitled to acting allowance and special duty allowance under clauses 7.5 and 7.6 respectively, of the Governance Manual.

89. Why all the hue and cry from the Respondent, when its own Human Resource Department gave the Petitioner advice and assurance on payment of both allowances?

**90. *Special duty allowance, was payable to the Petitioner and was paid regularly.***

**91. *There is no basis for the claim for refund of Kshs. 3,012,976 made by the Respondent, under Cause No. 722 of 2015. The Claim is declined.***

92. The Respondent referred to the Auditor- General Report for the year ended June 2013, in submitting that the allowances were irregular. The Report dated 6<sup>th</sup> December 2013 mentions a circular no. OP/CAB/55/1 dated 1<sup>st</sup> February 2012, but does not mention the Respondent's

Governance Manual. The Petitioner does not seem to have been in office at the time the Report was made, and was not called to answer audit queries. The Court would not take the Report as conclusive evidence that allowances were irregular, in light of other overwhelming evidence on record, on how and why the allowances were paid. Circulars from the Public Service Ministry would not in any event, override the Governance Manual of an Independent Commission. It is not clear if the Auditor-General took into account, that the Respondent had a Governance Manual, in preparation of his Report.

**Fair Termination.**

93. Was termination fair and lawful? The position taken by the Respondent that termination at the will of the Employer is a valid principle of employment law in Kenya, is misconceived. The law requires there is valid reason or reasons justifying termination, and that procedure is fair.

94. The Petitioner was acting CEO, acting Coordinator Finance and Administration and substantively Principal Officer Finance and Administration, as of 27<sup>th</sup> September 2012, when Irene Keino and Prof. Jane Onsongo were appointed as new Commissioners.

95. Immediately they assumed office, they stripped the Petitioner the role of Coordinator, and handed it over to Paul Wambua who substantively, was an Accountant under the Petitioner.

96. This was not only irrational, but humiliating to the Petitioner, to be placed under an Officer junior to her, from the lofty position of acting CEO and Coordinator - Finance and Administration. This demotion took place on 1<sup>st</sup> October 2012, on the new Commissioners' second working day. She was then advised that she had received illegal allowances, in a letter of 15<sup>th</sup> October 2012.

97. The allowances were stopped. A new acting CEO was appointed on 11<sup>th</sup> December 2012.

98. The hasty replacement of the Petitioner was illegal, because on 3<sup>rd</sup> December 2012, the Court in the *ACIYE* decision, cited above had directed that the Petitioner is sworn in as the Acting CEO, in accordance with the Constitution.

99. The Commissioners disregarded the Court Order, and appointed their own Acting CEO Abdi Ahmed Mohamud. Mohamud acted for about 1 month.

100. The substantive CEO was appointed on 21<sup>st</sup> January 2013, and terminated the Petitioner's contract on 28<sup>th</sup> March 2013.

101. There were no allegations put to the Petitioner; there was no letter to show cause; there were no charges; there was no disciplinary hearing; and no findings that the Petitioner was involved in any employment offence.

102. The Respondent states that the Petitioner's contract was terminated fairly and lawfully, but from the recollection of events above, there was no valid reason shown, and procedural fairness was disregarded.

103. All termination of contracts of employment must meet the tests of substantive justification and procedural fairness.

104. Attention of the Court was also drawn to the vetting process undertaken by the Respondent, with respect to existing Employees of the Respondent's precursor.

105. It was suggested that the Petitioner was vetted out. There were no proceedings and findings of the vetting entity placed before the Court.

106. Courts in *ACIYE case; Nicholas Mwenda Mtwarachiu and 7 Others v. Ethics and Anti- Corruption Commission and 5 Others [2014] e-KLR*; and *Appeal arising from the latter decision cited at paragraph 55 of this Judgment*, agreed that vetting leading to termination of Employees' contracts was a nullity. The Commission made up of Keino and Prof. Onsongo was not fully constituted, to make the decisions surrounding the vetting process and termination of employment.

107. ***Termination was unfair and unlawful.***

**Constitutional violations:**

108. While there is ground to conclude that the Petitioner's contract was terminated unfairly and unlawfully, the Court is hesitant to conclude that the Petitioner suffered constitutional violations.

109. Unfair and unlawful termination of her contract can be remedied under the Employment Act, without the aid of the Constitution of Kenya.

110. The violations she complains about were largely caused by misunderstanding of the transitional provisions in the Constitution, by the various offices entrusted that exercise. There was no clear guidance to the Respondent from the law on transition and when the Petitioner was conferred the mandate of transitioning the Respondent, it was not done on firm legal ground. The Advisory Body, the Directorate of Personnel Management, the Head of Public Service, and the new Commissioners were not clear what was supposed to be done with respect to the transitioning of the Respondent. Inconsistent advice issued from different quarters, resulting in lack of adequate protection for the Petitioner. This lack of adequate protection to the Petitioner, affected her contract of employment, rather than her constitutional rights. Remedies are available under the Employment Act.

**Remedies.**

111. The Petitioner has not established that she is entitled to loss of acting allowance as the Coordinator of Finance and Administration and acting allowances for October 2012 to 21<sup>st</sup> January 2013. She was not acting for the period claimed.

112. She has not shown that she was entitled to responsibility allowance, while acting as the CEO. An acting role does not attract payment of other benefits due to the substantive office. She was handsomely compensated in excess of her normal monthly salary, for the acting role. It is not proper to demand responsibility allowance in addition to acting allowance. She was not the substantive CEO.

113. Declaratory orders sought, except declaration that termination was unfair and unlawful, are not necessary add no value to the Judgment. ***It is declared that termination was unfair and unlawful.***

114. The Petitioner's contract was terminated on 28<sup>th</sup> March 2013. The letter of final dues, dated 2<sup>nd</sup> August 2013 however, indicates that she worked 29<sup>th</sup> March 2013 up to 2<sup>nd</sup> April 2013. It is not clear to the Court why an Employee would go on working after termination. The Respondent offered her salary for 2 days worked, at Kshs. 39,336. She pleads Kshs. 31,400 as salary for the 2 days. In the computation of the Court, based on a working month of 26 days and monthly salary of Kshs. 471,000, salary for 2 days would be Kshs. 36,230. ***The Court must however endorse the amount of Kshs. 39,336 offered by the Respondent, which is superior to all other figures suggested by the Petitioner and the Court, as salary for the 2 days worked by the Petitioner.***

115. Acting and special allowances were not part of monthly remuneration as Principal Officer, Finance and Accounts. They should not therefore be part of the gross salary in considering compensation for unfair termination.

116. Her pay slips on record show she earned monthly basic salary of Kshs. 384,000, house allowance of Kshs. 50,000 and transport allowance of Kshs. 37,000. Her monthly gross salary was Kshs. 471,000. This is the figure the Petitioner correctly adopts, as gross monthly earning.

117. She had worked for 7 years. Her contract had been renewed. There is no adverse record on discipline and performance, concerning the Petitioner, brought before the Court. Her contract was to expire in March 2014. Termination occurred 12 months prematurely. The conduct and capability of the Petitioner were never in doubt. There were no warnings in her record. She was entrusted the stewardship of the entire organization, at a critical phase of its life. Procedure adopted by the Commissioners in reaching their decision to terminate the Petitioner's contract was against the law.

118. She claims compensation for the remaining 12 months, in her contract, as well as compensation equivalent of 12 months' gross salary. This is not tenable. In assessing compensation, the Court is mandated to take into account the length of service, and reasonable expectation of the Employee as to the length of time for which his employment with that Employer might have continued, but for termination [Section 49 [4] [e] and [f], Employment Act]. The remainder of the contract period is considered under this provision, and cannot in the view of the Court, form the basis for a separate award, where compensation is allowed. What the Petitioner has done is replicate her prayers on this item, and crave double compensation.

119. She also double claims gratuity under paragraph vii [c] and viii [b] of her Petition. Only one prayer for gratuity can be considered.

120. ***She is granted compensation equivalent of 12 months' salary in compensation for unfair termination at Kshs. 5,652,000.***

121. ***She is allowed the prayer for 3 months' salary in lieu of notice under her contract, and as offered in the letter of termination, at Kshs. 1,413,000.***

122. The letter of termination acknowledged that the Petitioner was owed 18 days of annual leave, which the Court allows, at Kshs. 471,000, divide by 26 working days x 18 days = Kshs. 326,076. ***The Petitioner is granted Kshs. 326,076 as annual leave pay.***

123. Her contract granted her service gratuity calculated at 31 % of her basic monthly salary, payable at the end of the contract. This item was acknowledged by the Respondent in the letters of termination and final dues. It was in her contract. The clause on gratuity states 'you will be entitled to gratuity computed at the rate of 31% of your monthly basic pay, payable in accordance with the provisions of the KACC Staff Gratuity.' The Respondent in its letter of 2<sup>nd</sup> August 2013, referenced 'final dues' computed service gratuity up to 28<sup>th</sup> March 2013, at Kshs. 2,810,880. ***The Petitioner is granted service gratuity as computed by the Respondent, at Kshs. 2,810,880.***

124. ***Lastly the Court allows the prayer for costs, and interest from the date of Judgment, in favour of the Petitioner.***

***IN SUM, IT IS ORDERED: -***

***a. The Claim by the Respondent in this Petition, under Cause Number 722 of 2015, which was consolidated with the Petition herein, for a sum of Kshs. 3,012,976, costs and interest, against the Petitioner is declined.***

***b. It is declared that termination of the Petitioner's contract was unfair and unlawful.***

***c. The Respondent shall pay to the Petitioner: Kshs. 39,336 as salary for 2 days worked; compensation for unfair termination equivalent of the Petitioner's 12 months' gross salary at Kshs. 5,652,000; 3 months' salary in notice pay at Kshs. 1,413,000; annual leave of 18 days at Kshs. 326,076; and service gratuity at Kshs. 2,810,880 - total Kshs. 10,241,292.***

*d. Costs to the Petitioner.*

*e. Interest allowed at court rates from the date of Judgment, till payment is made in full.*

Dated, signed and released electronically to the Parties at Chaka, Nyeri County, under Ministry of Health and Judiciary Covid-19 Guidelines, this 28<sup>th</sup> day of July 2021.

James Rika

Judge