



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION 21 OF 2020

IN THE MATTER OF ARTICLE 1, 2, 3 (1), 10, 19, 20, 21, 22, 27 (1) (2)(3), 28, 47 (1) (2), 50 (1), 165 (3) (B) & AND 258 (1) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27 (1) (2) (3), 28, 41 (1) AND 50 (1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF RULES 4, 10, 11,13 AND 20 OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES

AND

IN THE MATTER OF SECTION 31 AND 40 (1) & (2) OF THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012

AND

IN THE MATTER OF SECTION 4 OF THE FAIR ADMINISTRATIVE ACTION ACT

AND

IN THE MATTER OF SECTIONS 41 AND 45 OF THE EMPLOYMENT ACT

BETWEEN

ABDIAZIZI SHEIKH MAAD.....1ST PETITIONER

SHAMSA MOHAMMED HAJI.....2ND PETITIONER

JOHORA MOHAMED ABDI.....3RD PETITIONER

HASSAN MOHAMED AHMED.....4TH PETITIONER

AND

THE GOVERNOR, MANDERA COUNTY.....1ST RESPONDENT

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

MANDERA COUNTY

PUBLIC SERVICE BOARD.....3RD RESPONDENT

JUDGMENT

1. The 1st, 2nd and 3rd Petitioners are members of the Mandera County Executive Committee in charge of investment, industrialization, and co-operatives development; gender and social services; agriculture, livestock, and fisheries, respectively. The 4th Petitioner is the Mandera County Chief Officer in charge of medical services.

2. The 1st Respondent is the Governor of Mandera county whose functions are governed by Chapter 11 of the Constitution and the County Governments Act of 2012. The 2nd Respondent is one of the 47 counties established under article 176 of the Constitution. The 3rd Respondent is the Mandera County Public Service Board established under section 57 of the County Governments Act.

3. The 1st, 2nd and 3rd Petitioners were nominated by the 1st Respondent, vetted by the County Assembly of Mandera and thereafter appointed as committee members on 25.7.2018. The 4th Petitioner was appointed on 26.9.2018 as the chief officer in charge of medical services. However, on 13.2.2020, the Respondents informed them that they had been dismissed from employment with effect from 15.3.2020. Aggrieved by that decision and the circumstances of their dismissal, the Petitioners instituted the petition herein. The Petition is supported by the Petitioners' Affidavits sworn in support of the Petition and the Notice of Motion Application dated 17.2.2020. They seek the following reliefs from this Court-

a. A declaration that the act of the 1st Respondent in relieving the Petitioners of their duties is a breach of the latter's constitutional rights under articles 27 (1), (2) and (3), 28, 41, 48 and 50 of the Constitution and that the same is null and void for all intent and purposes.

b. An order of judicial review of certiorari to quash the decision of the 1st Respondent relieving the 1st, 2nd and 3rd Petitioners of their duties as County Executive Committee Members and the 4th Petitioner as a Chief Officer.

c. An order of judicial review of prohibition, to prohibit the Respondents from appointing any fresh nominee for approval by the Mandera County Assembly for appointment as members of the Mandera County Executive or Chief Officer.

d. In alternative and without prejudice to prayer (b) and (c) above, an order of payment of all dues to the Petitioners in the period that they would have served between the date of filing the Petition and the end of the term.

e. Cost of this Petition and interest thereon.

f. Any other relief or order that this Honourable court may deem fit to grant.

4. The Respondents rely on the Replying Affidavit of Abdinur Maalim Hussein, the County Secretary for the 2nd respondent, which was sworn on 28.2.2020 in opposition to the Petitioners' Application, as a response to the Petition.

The Petitioners' Case

5. In brief, the petitioners case is that the 1st, 2nd, and 3rd petitioners were appointed by the 1st respondent as County Executive Committee Members on 25/7/2018, while the 4th petitioner was appointed as Chief Officer in Charge of Medical Services on 26/9/2018. The 1st petitioner was appointed in charge of trade, Investment, industrialization and cooperative Development; the 2nd petitioner was in charge of Gender and Social Services; while the 3rd petitioner was in charge of Agriculture, Livestock and Fisheries. All the four petitioners were appointed on 5 years' renewable contracts.

6. The petitioners further aver that on 15/3/2020, the 1st and 2nd respondent prematurely dismissed them from service without any justification, and in a manner that was disrespectful and degrading contrary to various constitutional and statutory provisions. They further aver that the dismissal was without sufficient reasons and without being afforded a fair hearing or an opportunity to defend themselves. They further averred that by dismissing them under section 40(1) of the County Government Act, the 1st respondent violated their rights to a fair hearing and fair labour practices, and right to fair administrative action because the reasons cited were fictitious, contrary to Article 41 and 47 of the Constitution. They also contended that the dismissal was contrary to section 4 of the Fair Administrative Actions Act, and section 41 and 45 of the Employment Act. The petition is supported by the affidavits sworn by each petitioner.

7. In their supporting affidavits sworn in support of the petition, the 1st, 2nd and 3rd Petitioners aver that on 25.7.2018 they entered into contract with the 2nd Respondent where they served as ECMs in charge of the said dockets under on 5 years' renewable contracts; and that under the contracts, either party could terminate the same by issuing one months' notice or paying one months' salary in lieu of notice to the other, but the employer reserved the right to terminate the contract summarily, without compensation if the petitioners were guilty of gross misconduct.

8. The petitioners further averred that on 13.2.2020 the Respondents arbitrarily dismissed them, barred them access to the office and the 1st respondent denied them audience; that the reasons cited in the dismissal letters were new to them and they were not true as all the material to exonerate them are in the office; that the interested party has never summoned them, neither has the Auditor General raised any audit queries or made any adverse findings regarding the expenditures in their respective dockets. According to them, the Respondents were satisfied with their performance and had even praised them for the same just before they were summarily dismissed. Finally, they denied ever being served with any warning during the term of the terminated contracts.

9. The petitioners maintained that their dismissal without being afforded an opportunity to be heard amounted to violation of their right to a fair hearing, fair labour practices and fair administrative action. Therefore, they prayed for the reliefs sought in the petition plus costs.

The Respondents' Case

10. The respondents' case is that that the Petitioners' letters of appointment indicated that they were tasked with promoting the interests of the 2nd Respondent but they failed to do so; that clause 5 (e) of the 4th Petitioners' contracts indicated that they could be reshuffled which could involve disengaging them; and that the 1st Respondent issued the 1st Petitioner with a warning letter on 20.3.2018 for failing to facilitate investigations into staff payroll mismanagement and issue a full report before 20th April 2018 but has never issued the same, to date.

11. It is further defence case that on 13.2.2020, the 1st Respondent exercised his power under section 31 (a) of the County Government Act and clauses 2.2, 5 (e) and 13 (a) of the contract and terminated the Petitioners' contracts upon expiry of 30 days' leave granted. It is the Respondents' position that the termination was in line with the terms of engagement and contend that the Petitioners have deliberately sought to mislead this Court on the application of section 40 instead section 31 (a) of the County Government Act which allows the 1st Respondent to exercise the doctrine of pleasure. Therefore, they aver that the 1st to 3rd Petitioners' rights under articles 41 and 50 of the Constitution have not been violated as they are not employees under the Employment Act.

12. The respondents further aver that the reinstatement orders sought are in violation of the 1st Respondent's individual autonomy in the nomination and selection of members to committee and are intended to frustrate and delay the functioning of the Respondents. They further aver that if the orders sought are granted, the administrative role of the 1st Respondent to terminate the services of the members of the committee where necessary, the principle of separation of powers and the terms of engagement will be rendered nugatory. Finally, they contend that the Respondents exercised their powers reasonably and in the public interest.

The Petitioners' Rejoinders

13. In their further affidavits, the Petitioners contend that their termination letters and paragraphs 15, 16 and 17 of the Respondents' Replying Affidavit do not prove the allegations set out therein neither have they disclosed any violations or acts of commission or omission of illegalities committed by them that warranted their dismissal. They contended that clause 5 (e) of their contract permitted reshuffling but denied that it entails disengaging a member from their portfolio.

14. They further aver that the dismissal letters did not cite any provision of the law to warrant their removal from office. They aver that their dismissal letters do not constitute the notice anticipated in section 40 of the Act or paragraph 13 (b) of her contract and averred that the letters constituted an accusation, prosecution, and conviction by the 1st Respondent hence a violation of section 4 of the Fair Administrative Action Act and articles 22, 28, 47 and 50 of the Constitution.

15. According to the Petitioners, the pleasure doctrine does not exist in Kenya as it is akin to a master-slave relationship where no rule of law prevails, hence a violation of their employment and constitutional rights. Further, that since they were appointed by the people of Mandera County and not the 1st Respondent, theirs is a public office not amenable to the pleasure principle.

16. They aver that the 1st Respondent's reliance upon section 31 (a) of the County Government Act is an afterthought as their dismissal letters did not refer to the same. Further, that relying on it violates the test of reasonableness and public good.

17. It is their deposition that their dismissal letters contain inconsistencies and contradictions that are unreasonable and unfounded allegations directed at their person and profession and which they did not get an opportunity to respond to. It is their position that failure to observe due process is fatal and violate their constitutional rights.

18. The Petitioners aver that their absence in office has constrained service delivery of the 2nd Respondent and contend that no prejudice will be suffered if they resume office, as no citizen of Mandera County has made a complaint against them to warrant their dismissal. As such, if the orders sought are not granted, the taxpayers will continue to suffer irreparably.

19. It is their position that the orders sought do not interfere with the separation of powers, instead, it will enhance the realization of the Constitution's aspirations.

20. Due to the urgency of the petition the parties agreed to dispense with calling witnesses and instead agreed to dispose of the suit by way of oral submissions by counsel in the open Court.

The Petitioners' Submissions

21. Mr. Mogaka, counsel for the Petitioners, submitted that the Petitioners are public officers as defined under article 260 of the Constitution and as such, they are protected from removal from office, dismissal or demotion without due process, by dint of article 236 (b) of the Constitution. However, he contended that due process as envisioned in article 47 of the Constitution and section 4 of the Fair Administrative Action Act was not followed before the dismissal herein since the Petitioners were not given an opportunity to present their defence against the allegations made against them.

22. They rely on the case of *County Government of Nyeri & Another vs. Cecilia Wangechi Ndungu [2015] eKLR* where the Court held that a governor ought to exercise his power under section 31 (a) of the County Governments Act to dismiss a member of a county executive committee, reasonably and for the public good.

23. He further submitted that the 1st Respondent did not have the power to dismiss the 4th Petitioner from employment and his action for writing the dismissal letter usurped the 3rd Respondent's powers. He relied on the case of *David Ogega Kebiro & Another vs. Kisii County*

Public Service Board & Another [2017] eKLR where the court held that a governor has no power to dismiss a chief officer.

24. He submitted that the pleasure principle relied upon by the Respondent was not stated in the appointment letter and is not aligned with the Constitution as was held in the case of **County Government of Nyeri & Another vs. Cecilia Wangechi Ndungu [SUPRA]**. It was his position that the principle brought about a master-slave relationship which should not be allowed and that article 236 (b) of the Constitution insulated public officers from unfair removal.

25. Consequently, the Petitioners submit that the termination of their employment did not meet the substantive and procedural dictates governing the termination of employment.

26. On the other hand, the Counsel submitted that there was no response from the 1st and 3rd Respondent hence the petition should be allowed as the claim against the 1st and 3rd Respondent because it is undefended. It was his submissions that the CS had not presented any authority from the 1st and 3rd Respondent to swear the affidavit on their behalf. Finally, he urged this Court to issue the prayers sought.

The Respondents' Submissions

27. Mr. Wanyama, counsel for the Respondents, submitted that though article 260 of the Constitution lists county executive members as state officers, section 30 of the County Governments Act gives the Governor power to dismiss them. He further submitted that the termination letters outlined the reasons for the Petitioners' termination and that the principle of separation of powers bars the court from inquiring into the validity of the reasons.

28. He relied on the case of **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** where the Court of Appeal held that courts should not apply the rational test by looking at the constitutionality of an act. He was of the view that the 1st Respondent was in a better position to determine the competence of the committee as opposed to the Court. He also cited the **County Government of Nyeri Case** where the court noted that cabinet secretaries could not sue the president for dismissal without a fair hearing.

29. As regards the authority of the CS to swear the replying affidavit, the counsel submitted that he was the head of the county public service hence competent to swear the affidavit on behalf of all the respondents, and as such, the same was adequate

30. He submitted that the Court in the **County Government of Nyeri Case** observed that the pleasure doctrine was applicable in Kenya because Kenya has a presidential system allowing the President and the Governor to appoint and dismiss cabinets secretaries and CEC members respectively. He therefore contended that the Court of Appeal had held that the committee members were not subject to the Employment Act.

31. He further submitted that the test to the doctrine was that a governor could not dismiss a member without giving the reasons for such dismissal. According to him, the reasons given for the 1st to 3rd Petitioners' dismissal was loss of public confidence and that the dismissal was in the public interest. Further, he submitted that while using the rational test to review the decision of the governor, the Court ought to have in mind the functioning of the county government and the public interest. He cited the case of **Advisory Reference 2 of 2013; Senate vs. National Assembly** where the Supreme Court observed that the Court has a duty to protect and nurture devolution.

32. It was the Counsel's submission that if the remedy for reinstatement was awarded, the county government would be dysfunctional, which would be totally against nurturing and protecting the county government. He relies on the **County Government of Nyeri Case** where the Court was of the view that the functioning of the government and the public interest were material.

33. Mr. Wanyama submitted that this Court could not rely on the decision of **David Ogega Kebiro & Another vs. Kisii County Public Service Board & Another [SUPRA]** because in his opinion, the decision was made *per incuriam* and had caused chaos between the appointing authority and the government. For instance, he submitted that according to section 45 of the County Government Act, the chief officer could be appointed by the governor but according to the case of **David Ogega Kebiro & Another vs. Kisii County Public Service Board & Another**, the court held that there was no statutory provision regarding that appointment.

34. He urged that the requirement for terminal dues and their particulars were not pleaded. As such, in the event the petition was successful, the Petitioners would not be entitled to anything. He cited the case of **Venansio Mbataru Kariuki vs. Governor, County Government of Nyandarua & 2 others [2019] eKLR** where the Court declined to reinstate the county executive managers. He further urged that the petition had not been proved and should be dismissed without costs.

The Petitioners' Rejoinder

35. In his rejoinder, Mr. Mogaka submitted that the warning letter referred to by Mr. Wanyama relates to the previous contract and not the contract in issue. To buttress his position, he relied on the **County Government of Nyeri Case [SUPRA]** where the Court of Appeal indicated that termination of employment must be for a valid and compelling reason. The Court of Appeal further observed that the governor's actions must be reasonable and found that the right to fair administrative action had been violated.

36. It was also his submissions that reinstatement as a remedy was still possible as the termination of the Petitioners' employment had still not taken effect. He urged that the Petition be allowed.

Issues for determination

37. I have carefully considered the petition, the affidavits and submissions by counsel it is clear that the Petitioners' contracts of services

were prematurely terminated by the 1st respondent vide the letters dated 13/2/2020. It is also common ground that the dismissal was done under section 31 (a) of the County Governments Act and the termination clause of the petitioners' respective contract of service. The main issues for determination are-

- a. Whether the petitioners were employed at the pleasure of the 1st respondent.
- b. Whether due process was followed before the dismissal.
- c. Whether the petitioners' fundamental rights and freedoms were violated by the dismissal.
- d. Whether the Petitioners are entitled to the reliefs sought.

Analysis

(a) Whether the petitioners were employed at the pleasure of the 1st respondent.

38. The respondents contend that the petitioners were employed by the 2nd respondent during the pleasure of the 1st respondent because under section 31(a) of the County Governments Act, the 1st respondent was entitled to dismiss them without giving any reason, cause or any hearing. The petitioners, on the other hand contend that the pleasure doctrine has no place in Kenya as the same was abolished by the 2010 Constitution and its place taken by due process of the law.

39. In *County Government of Nyeri & Another vs. Cecilia Wangechi Ndungu* [2014] e KLR the Court of Appeal held that:

“We are of the considered view that 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... 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”.

40. In *Narok County government & another v Richard Bwogo Birir & another* [2015] e KLR, the Court of Appeal differently constituted, differed with the Nyeri Bench and held that :

“In the end, the Court held that the doctrine is applicable in Kenya under section 31(a) of the County Governments Act save that the same ought to be exercised reasonably and not arbitrarily or capriciously....

However, we respectively differ with the finding that the pleasure doctrine has been preserved under section 31(a) of the County Government Act. We think for ourselves that the construction of the section must be made in the right context....

Consequently, we find and hold that the pleasure doctrine is not applicable in Kenya under the Current Constitution.”

41. I am persuaded to follow the decision in **Richard Bwogo Birir Case** because, in my view, the current Constitution does not fathom a case were by public officer or State officer would be punished or removed from office without following the due process of the law. As correctly held in the **Cecilia Wangechi Ndungu case**, a Governor has an obligation to act fairly, reasonably and for the common good of the constituents of the county.

(b) Whether due process was followed before the dismissal.

42. The Petitioners have submitted that the termination of their employment was unlawful because there was no valid reason, and they were not afforded an opportunity to present their case, contrary to section 4 of the Fair Administrative Action Act and articles 22, 28, 47 and 50 of the Constitution. On the other hand, the Respondents aver that the termination was lawful because the 1st Respondent had the power to dismiss them from employment pursuant to section 31 (a) of the Act if he considers it appropriate or necessary for the common good of the constituents of the county, and in so doing, he did not need to follow due process.

43. The Petitioners were serving in different capacities, the 1st to 3rd Petitioners as CEC Members while the 4th Petitioner served as a chief officer and as such the procedure of their respective dismissals should be reviewed separately. However, there is a common denominator in the petitioners' cases, that is, all of them are public officers within the meaning of Article 260 of the Constitution and they enjoy protection from arbitrary dismissal or removal from office under Article 236 of the Constitution. The said provision states in mandatory terms that: -

“A public officer shall not be-

(a) victimised or discriminated against for having performed the functions of office in accordance with this Constitution or any other law; or

(b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of the law.”

44. The due process envisaged by Article 236 is set out under Article 47 of the Constitution and amplified by section 4 of the Fair

Administrative Actions Act. Article 47 provides that:

“(1). Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2). If a right or fundamental freedom of a person is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

45. Section 4 of the Fair Administrative Actions Act provides that: -

“(1). Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) Every person has the right to be given written reasons for any administrative action that is taken against him.

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision—

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) ...

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to—

(b) attend proceedings, in person or in the company of an expert of his choice;

(c) be heard...”

46. It is well settled that a Governor enjoys discretion when it comes to dismissing his County Executive Committee Members under section 31 (a) of the County Governments Act. The said section which provides as follows-

“The governor—

(b) 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.”

47. In the **Cecilia Wangechi Ndungu case**, *supra*, the Court of Appeal observed in the paragraph quoted herein that above, section 31(a) of the County Government Act grants a governor power to dismissal County Executive Committee Member at his pleasure, however it went ahead to state that the governor must not act arbitrarily or capriciously but reasonably for the common good of the people in the county.

48. The 1st, 2nd and 3rd Petitioners were dismissed from office by the letters received on 13.2.2020, pursuant to section 31 (a) of the County Government Act, and clauses 2.2 and 13 of the service agreement which allowed either party to terminate the contract by issuing one month's notice or payment of one month's salary in lieu of notice. Their dismissal letters indicated that their employment was being terminated for failing to undertake their responsibilities as set out in clause 4 of the service agreement, section 36 of the County Government Act and article 183 of the Constitution.

49. After careful consideration of the evidence presented, I find that the 1st respondent acted reasonably by communicating in writing to the petitioners, the reasons for the dismissal. This view is fortified by the Court of Appeal decision in the **Cecilia Wangechi Ndungu case**, where it faulted the Governor for failure to inform the Executive Committee Member the reason for the dismissal, thus: -

“... the respondent was dismissed vide the letter dated 24th June 2014 with immediate effect. From the said letter it is not clear under what circumstances the respondent's services were terminated. We also note that no evidence was tendered by the appellants as to the reasons(s) for the dismissal. In fact, the appellants maintained that 2nd appellant had the power to dismiss the respondent at his pleasure without giving reasons. We find that in the circumstances that the respondent proved that the 2nd appellant's actions were arbitrary. This is because there was no evidence that the 2nd appellant acted reasonably in dismissing the respondent”

50. The court of Appeal in **Richard Bwogo Birir case**, also faulted the dismissal of a County Executive Committee Member for failure by the governor to inform the member the reason(s) for the dismissal.

51. The foregoing view notwithstanding, the petitioners maintained that the reasons for the dismissal were not valid and filed further affidavits giving details of the achievements they had made under their terms of service and annexed supporting documents. The Respondents never filed any further affidavit to rebut the evidence by the petitioners that they had performed the job satisfactorily. The only adverse evidence adduced was that the 1st Petitioner had been issued with a warning letter prior to his dismissal and failed to heed until the day he was dismissed. However, the 1st petitioner contended that the warning letter lapsed with his expired contract, and further contended that the warning letter related to disciplinary process which fall under the Chief officer, and that it was concluded by the dismissal of the HR Director and the Payroll Manager.

52. I have considered the material presented to the court and I agree with the petitioners that the respondent did not adduce any evidence to prove the validity of the reason cited for dismissing the 1st, 2nd and 3rd petitioners in the respective dismissal letters. In my opinion, once the petitioners challenged the validity of the reason for their dismissal, the respondents ought to adduce evidence to substantiate the reason for the dismissal in order for the court to determine whether or not the Governor exercised his discretion arbitrarily, capriciously or whimsically.

53. In addition, I agree with the 1st Petitioner that the warning letter issued to him on 20th March 2018 before he signed the new contract on 25th July 2018 is not a valid ground for dismissal because the 1st respondent waived it when he issued him with a new contract. He is therefore estopped from using it to end the new contract as the warning letter was overtaken by events. On the other hand, the explanation by the petitioner that the matter was handled by the Chief officer and culminated with the dismissal of two officers has not been rebutted. In my view the explanation is has merits considering the role of a Chief Officer as the Authorized Officer with delegated powers to deal with disciplinary cases under section 45(4) of the County Governments Act.

54. In view of the finding above that the respondents did not adduce any evidence to support the alleged gross misconduct by the 1st, 2nd and 3rd petitioners, I return that their dismissal under section 31 (a) of the County Government Act was not justified by valid reason(s).

55. As regards procedural fairness, the respondents did not adduce any evidence to rebut the allegation by the petitioners that they were never given any prior notice of their wrong doing and invited to make their representations before the dismissal. As already set out above, Article 47 of the Constitution and section 4 of the Fair Administrative Actions Act entitles every person the right to be given reasonable notice of any intended administrative action and then be given an opportunity to defend himself/ herself before the action is undertaken. In this case the petitioners were not served with any show cause letter or accorded any oral hearing by the 1st respondent or at all before the dismissal. Consequently, I return that the dismissal of the 1st, 2nd and 3rd petitioners was done without following due process but through breach of the rules of natural justice.

56. Although in the instant case the 1st respondent communicated the reason(s) for dismissing petitioners' services, under Section 4 of the Fair Administrative Action Act, I hold that the administrator is obligated to, not only notify the person of the reason(s) for which action is being contemplated, but also, to grant the person an opportunity to air his/her representations in response to the alleged reason.

57. As regards the dismissal of the 4th Petitioner, the dismissal letter was signed by the Governor and the reason cited was also gross misconduct. The 4th Petitioner was a county Chief Officer in charge of medical services and not a member of the County Executive Committee and as such he contended that the governor no mandate to dismiss him. Section 45 provides as follows concerning a Chief Officer-

(1) The governor shall—

(b) nominate qualified and experienced county chief officers from among persons competitively sourced and recommended by the County Public Service Board; and

(c) with the approval of the county assembly, appoint county chief officers.

(2) The office of a county chief officer shall be an office in the county public service.

(5) The governor may re-assign a county chief officer. [Emphasis added]

58. Mr. Wanyama, for the Respondents, has however submitted that section 45 (6) of the County Government Act presented a lacuna on whether the appointing officer could also dismiss. As such, he urged that the fall back provision would be section 51 of the General Provision and Interpretation Act which provides that power to appoint means the power to dismiss.

59. The question whether a governor can dismiss a Chief Officer was answered by the Court of Appeal in **Kisumu County Public Service Board & another v Samuel Okudo & 7 others [2018] e KLR** where the court held that: -

“We have come to the conclusion that the Governor initiated the removal of the respondent without following the appropriate machinery. The respondents being county public officers, the Governor could not terminate their services without involving the County Public Service Board and the County Assembly. In sending the respondents on compulsory leave and terminating the respondent’s contracts, the Governor usurped the role of the County Board.”

60. The functions of the County Public Service Boards are spelt out under Section 59 of the County Government Act which obligates each

Board to perform the following functions on behalf of its county government: -

“(a) establish and abolish offices in the county public service;

(b) appoint persons to hold or act in offices of the county public service including in the Boards of cities and urban areas within the county and to confirm appointments;

(c) exercise disciplinary control over, and remove, persons holding or acting in those offices as provided for under this Part; ...”
[emphasis mine].

61. In view of the foregoing, I find and hold that apart from acting arbitrarily and without any justification, the 1st Respondent lacked the powers to dismiss the 4th Petitioner. Consequently, I return that the dismissal was unlawful and not done in accordance with the due process of the law.

(c) Whether the petitioners’ fundamental rights and freedoms were violated by the dismissal.

62. The petitioners’ case is that their fundamental rights and freedoms were violated by the premature dismissal of their contracts by the 1st respondent. However, the respondents are of a contrary view and maintained that the dismissal of the petitioners was justified and for the common good of the people of Mandera County. I am guided by **Kisumu County Public Service Board & another v Samuel Okudo & 7 others**, where the Court of Appeal held that: -

“In sending the respondents on compulsory leave and terminating the respondent’s contracts, the Governor usurped the role of the County Board. This denied the respondents their right under section 77 of the CGA that allow any county public officer that is dissatisfied with the decision of the County Board in disciplinary process to appeal to the Public Service Commission. Further, the respondents’ constitutional fundamental rights were violated.”

63. The facts of the instant case are the same as in the said precedent, and as such I find and hold that the 4th petitioner’s fundamental rights to fair administrative action and fair labour practices under Article 47 and 41 of the Constitution were violated by the unlawful dismissal by the 1st respondent because he acted *ultra vires* and thereby prevented the 4th petitioner from enjoying the right of appeal to the Public Service Commission.

64. As regards the 1st, 2nd and 3rd Petitioners, I am guided by **Cecilia Wangechi Ndungu case** and **Richard Bwogo Birir Case** where the Court of Appeal held that the failure by the Governor to give the reason for dismissing the County Executive Committee Members, violated their right to fair administrative action and fair labour practices under Article 47 and 41 of the constitution among other constitutional rights. In my view, the right to know the reason(s) for the administrative action and the right to be heard in response to the cited reason(s) are conjoined at the hip and failure to grant both or either of them to an employee, amounts to a violation of the fundamental right to fair administrative action and by extension violation to fundamental right to fair hearing and fair labour practices.

Reliefs Sought

65. I have established from the evidence presented by the Petitioners that their dismissal by the 1st respondent was unlawful because it was done arbitrarily, without any justification, and without following the due process set in the Constitution and the Fair Administrative Actions Act. I have further found that their fundamental rights to fair administrative action, fair labour practices and fair hearing were violated by the said unlawful dismissal.

66. As regards prayer (a) in the petition, I am satisfied that the Petitioners have proved that the 1st Respondent violated their fundamental right to fair administrative action, fair labour practices and fair hearing as envisaged by Article 47, 41 and 50 (1) of the Constitution by dismissing them arbitrarily, without justification and without following due process set out by the law. In my view of the foregoing, this is sufficient basis to warrant a declaration that their dismissal is null and void for all intent and purposes.

67. Under Article 20 of the Constitution, the Bill of rights applies to all law and binds all State organs and all persons and every person is entitled to enjoyment of the rights and fundamental freedoms in the Bill of Rights to the greatest extent. Accordingly, I make declarations that the 1st respondent’s act of relieving the petitioners of the duties violated their rights under Article 41, 47 and 50 of the Constitution and it is therefore null and void.

68. Flowing from the foregoing finding and declaration, I grant judicial review order of certiorari and prohibition as sought in prayer (a) and (b) in the petition. Article 23 (3) (f) of the Constitution, gives this court the power to grant an order for judicial review where an individual’s rights have been violated. The Petitioners have proved among others, that their right to fair administrative action under article 47 of the Constitution and amplified by section 4 of the Fair Administrative Action Act was infringed.

69. Further, it has been established that in dismissing the 4th Petitioner, the 1st Respondent acted *ultra vires* his powers as donated by the County Governments Act and the Constitution. By dint of section 7 (2) (a) (i) of the Fair Administrative Action Act, this Court has the power to review the 1st Respondent’s decision because it was done without authority. The said section provides that: -

“(2) A court or tribunal under subsection (1) may review an administrative action or decision, if—

(a) the person who made the decision—

i. was not authorized to do so by the empowering provision; ...”

70. The defence counsel submitted that granting judicial review orders under the prayer (b) and (c), above would render the 2nd respondent dysfunctional and negatively affect service delivery to the people of Mandera County. The petitioners have also prayed for damages in the form of all the dues for the remainder of their contract period as an alternative to reinstatement. The defence counsel has however opposed the alternative to relief contending that the petitioners did not specifically plead any monetary relief.

71. I have considered the submissions by the defence counsel that granting judicial review orders may render the county government dysfunctional and deny services to the constituents of Mandera County. The purpose of the court is to do justice and as such I give the respondents the liberty to compute and pay the petitioners the gratuity earned up to the date of the dismissal plus their salary for the remaining period of their contract term as an alternative to the judicial review orders granted above.

72. If the respondents chose to the option of paying damages as opposed to reinstatement, the following directions shall be adhered to as conditions precedent thereto: -

(b) The respondent shall indicate that choice within 30 days from the date of this judgment.

(c) Thereafter the respondents shall compute and pay damages within 90 days from the date of this judgment.

(d) Until the respondents pay all the rightful dues to the petitioners, the vacancies caused by the impugned dismissal shall not be filled by other persons.

(e) In default of (i) and/or (ii) above, the option of payment of damages shall be deemed to have been declined, and prayer (b and (c) in the petition shall remain in force.

73. Finally, I award costs of this Petition to the Petitioners.

Dated, signed and delivered in open court at Nairobi this 29th day of April, 2020.

ONESMUS N. MAKAU

JUDGE