REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT MOMBASA

PETITION NUMBER 5 OF 2020

IN THE MATTER OF: EMPLOYEES OF JAFFERY ACADEMY, NURSERY/JUNIOR/ SENIOR SCHOOL;

AND

IN THE MATTER OF: THE RIGHTS TO FAIR LABOUR PRACTICES UNDER ARTICLE 41 OF THE CONSTITUTION OF KENYA, 2010;

AND

IN THE MATTER OF: EMPLOYEES RIGHTS TO EQUALITY AND FREEDOM FROM DISCRIMINATION UNDER ARTICLE 27 OF THE CONSTITUTION, 2010 AND THE EMPLOYMENT ACT NO 11 OF 2007;

AND

IN THE MATTER OF: FAIR ADMINISTRATIVE ACTION ACT, 2015;

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA [PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS] PRACTICE AND PROCEDURE RULES, 2013;

AND

IN THE MATTER OF: THE EMPLOYMENT AND LABOUR RELATIONS COURT [PROCEDURE] RULES, 2016;

BETWEEN

1. EMMANUEL WAMBUA MUTHUSI

2. ERICK SOLONIC OLE KOYIET

3. ROSEMARY RARIENYA OMOLE

4. BONIFACE ITEVETTE LWOVA

5. RICHARD ONYANGO KANGU

6. EDWARD OYUGI

7. ALPHAN MWANYIKA CHUNGULA .....PETITIONERS

VERSUS

KHOJA SHIA ITHNA ASHARI EDUCATION BOARD t/a

JAFFERY ACADEMY .....RESPONDENT

Rika J

Onyango Onunga & Company, Advocates for the Petitioners

Oloo & Chatur Advocates for the Respondent

JUDGMENT

PETITION

1. The Petition was filed on 22nd May 2020.

2. The Petitioners, are Teachers, employed by the Respondent School.

3. They state, that following the closure of all Schools in Kenya by the Government, in the month of March 2020, as a measure of containment of the raging Covid-19 pandemic, the School Management convened virtual staff meeting to craft the way forward, to ensure continuity of learning at the Respondent School.

4. Among the measures taken, was to train Teachers on use of Google Classroom Application, as a medium of online classes. Online classes went on for 2 weeks without interruption until the School closed.

5. The Petitioners were not equipped with the necessary laptops by the Respondent, but in preparation for the next school term, and in a show of dedication to their calling, invested in their own private internet installations at their homes.

6. The Respondent wrote to the Petitioners on 1st April 2020 asking the Petitioners to take annual leave, until 21st April 2020. They were advised leave could be extended, depending on the public health situation. They were advised also, to familiarize with Virtual Learning Environment [VLE] program, an alternative to Google Classroom. They were asked to prepare holiday assignments for their Students.

7. When the School reopened, the Petitioners were surprised to learn that they were not on the VLE timetable.

8. On 29th April 2020, the acting Head of Senior School, sent out a circular to the Staff advising that *' ' April 2020 salary will be paid in full…however we urge you to spend it wisely… we may be required for business continuity, to adjust the salaries from May 2020.''*

9. The Petitioners were invited to a zoom meeting, to be held on 12th May 2020. The agenda was not communicated. At the meeting, the Respondent, categorized Teachers into 3 groups: Critical, Essential and Non-Essential.

10. They were further advised that effective end of May 2020, there would be adjustments to the monthly salaries. Non-Essential Staff would have 65% pay-cut, while Essential Staff would take 45% pay-cut. There was no word on the pay-cut to be taken by the Critical category. The Petitioners received e-mails on 13th May 2020, asking them to confirm acceptance of pay reduction.

11. They felt aggrieved, taking into account that: no consultations were made prior to salary reduction; in a letter dated 11th May 2020, the Respondent advised Parents and Guardians, that school fees had been reduced by 30% for Nursery School, 25% for Junior School and 20% for Senior School; the pay reduction was not commensurate with the fees reduction; the criteria employed in categorization of the Teachers was unknown; the selection process was not transparent and did not take into account seniority; the Respondent did not clarify if the forfeited salary would be repaid once Covid-19 was eliminated; the duration of the pay adjustment was not clarified, and Petitioners would be hampered in working out their obligations with financial Institutions; the notice period for adjustment was too short; the decision was made by the Board without the involvement of the Teachers; and the communication did not state which category each Teacher fell in, hence causing unnecessary anxiety.

12. The Petitioners state, that the Respondent has violated **Article 41** of the Constitution, which guarantees every Worker fair labour rights, including the right to fair remuneration and reasonable working conditions. **Article 27** entitles the Petitioners to equal treatment, including the right to equal opportunities in economic and social spheres. It also forbids direct or indirect discrimination. **Section 5 of the Employment Act 2007,** prohibits discrimination at the workplace. **Article 47** entitles everyone, to fair administrative action which is reasonable and lawful. The Respondent was bound to give the Petitioners written reasons for the decision. Article 47 is buttressed by **Section 10 [5] of the Employment Act,** which obligates the Employer to make changes to an Employee's contract, only in consultation with the Employee. Further, the Petitioners state, their rights to human dignity, under **Article 28** and the right not to be treated in cruel, inhuman or degrading manner under **Article 29,** have been violated.

13. They petition for the following orders*:* -

a. A declaration be and is hereby issued that the Respondent's actions and omissions are a violation of the Petitioners' rights under Articles 41, 23 [3], 28, 29, and 47 of the Constitution.

b. Damages for violation of the Petitioners' rights under paragraph [a] above.

c. Such other, or further orders or directions, as the Court may deem fit to grant so as to meet the interest of justice.

d. Costs of the Petition.

14. Contemporaneously, the Petitioners filed an Application for interim measures, as follows: -

> *a. The Respondent is barred from making unlawful and discriminatory salary adjustments pending hearing of the Application* ***inter partes****.*
>
> *b. The Respondent is restrained from directly discriminating the Petitioners in respect of matters arising out of their employment.*

15. The Petition and the Application are founded on the Affidavit of Emmanuel Wambua Muthusi, sworn on 22nd May 2020.

16. On 16th June 2020, the Court directed that the Application and the Petition, be merged, and be considered and determined through Written Submissions. The Application and the Petition seek similar remedies of a substantive nature.

Response

17. The response is mainly contained in the Affidavit sworn by Jonah Safari Alwiga, Head Teacher of the Senior School, on 12th June 2020.

18. He explains that the Respondent is a private Educational Institution, comprising Nursery, Primary and Secondary Sections. It has 136 Staff, 87 being Teachers and 49 Support-Staff. The Institution is managed through a Board of Management. It is not profit-oriented. It offers needy Students subsidised fees. All Teachers have separate and severable contracts.

19. In countering Covid-19, Parties engaged, and several suggestions on the way forward were floated, which included: working from home; sending Staff on either paid or unpaid leave; cutting salaries; resort to redundancy or regular termination of the contracts; and imploring of Employees to be reasonable.

20. The Respondent had difficult choices to make, informed by the fact that the existing public health situation is novel. There exists a legal lacuna on how to deal with the novelty.

21. Private Schools such as the Respondent, pay salaries based solely on fees paid by Parents. The critical challenge facing the Respondent is the ability to pay salaries, when there is no normal schooling. Parents and Guardians, agitated for reduction in fees. The Head Teacher exhibits letters from Parents at his School, who made such demands. The Respondent caved in to these demands, and reduced the school fees at 30% for the Nursery, 25% for the Primary, and 20% for the Secondary sections. Parents are demanding further reductions.

22. As pointed out by the 1st Petitioner in his Affidavit, the Respondent convened several Staff meetings to discuss continuity of learning. It was agreed online sessions be carried out. All Teachers were trained, and requested to familiarize themselves, with the necessary online platforms. However, these platforms could not accommodate all Teachers due to reduction in workload. The platforms offered 5 lessons compared to the normal 7 lessons a day. Extra or co-curricular activities were suspended.

23. For purely administrative purposes, the Respondent categorized the Teachers into 3 groups: Critical, Essential and Non-Essential. To ensure those without lessons retained their employment, the Respondent asked them to take leave with pay-cut of 65%, while those with virtual lessons took 45% pay-cut. This was done with consultation, between the Parties.

24. Reduction of salary was predicated on reduced income from school fees; unbudgeted costs of virtual learning and ICT infrastructure; unpaid school fees; Parents are not financing VLE even as they agitate for reduction in fees; reduction in number of Students, with the whole of year 13 dropping out due to cancelled international exams, and year 11 is only partially attending; operation costs continue to be incurred irrespective of the closure; and provision for reserve funds, to finance reopening when the public health situation changes, and to finance any preconditions the Government may impose for reopening.

25. The Petitioners' argument that pay-cut was not commensurate with the percentages in fees reduction is flawed. School fee is not apportioned on a ratio of 1:1 with Staff Salary. The Respondent could not advise on how long the pay-cut would remain in force, as it has no control, on when the pandemic abates or is eliminated. The Respondent should be lauded for bending backwards, to retain the Petitioners in employment, amidst a very difficult situation. Learning was suspended in March 2020, with immediate impact on the economy. The Respondent however only started reducing salaries in May 2020. The Respondent urges the Court to reject the Petition in its totality.

Petitioners' Submissions

26. The Petitioners submit that the Respondent filed a single Affidavit in response to the Application for Interim Measures, and the Petition. They submit, they filed an Application for Contempt of Court dated 12th June 2020. The Application is unopposed.

27. The facts are largely uncontroverted, the Petitioners submit. There is common ground on events surrounding the outbreak of Covid-19.

28. The Petitioners argue that discord started brewing, when the Respondent categorized the Teachers, and imposed pay reduction, based on the categories. There was no consultation. The factors in categorization were not disclosed. The Petitioners were not told which category they fell in. There was no clarity on the duration of the changed pay structure. The Petitioners were hampered in individual financial planning.

The notice for pay adjustment was too short. They were discriminated against.

29. They restate that the Articles of Constitution mentioned at paragraph 12 of this Judgment, have been flouted.

30. They submit: ***''the outbreak of Covid-19 pandemic ushered in increasingly turbulent and unpredictable times across the globe. Here at home, the pandemic has wreaked havoc on the Country's economy, businesses, and livelihoods of our fellow Countrymen. The sting of the trickledown effect of this crisis has not spared the workplace. Judicial notice may be taken of the fact that many existing employment relationships have been adversely affected and it has become very difficult to perform existing contractual obligations.''***

31. Some of the measures taken by Employers in response to the situation, include variation in terms of the contracts. These include, reduction of salary; pay on piece rate basis; withdrawal of benefits; sending Employees on unpaid leave; change in hours of work; transfers; and relocation.

32. It is submitted for the Petitioners, that the Respondent opted for pay-cuts; sending Staff on unpaid leave; and adopting virtual learning. These measures, while good for business sustainability, were a knee jerk reaction, without backing of the law. The Respondent gave a blind eye to fair labour practices, sacrificing Petitioners' constitutional rights, at the altar of self-preservation. The Respondent has a duty to adhere to the tenets of Article 41 of the Constitution of Kenya and the Employment Act 2007. In particular, the Respondent failed to consult, and *reach an agreement* with the Petitioners, in varying their contracts. The course taken by the Respondent amounts to breach or repudiation of the contracts.

33. Section 10 [5] of the Employment Act requires that where the particulars in any employment contract change, the Employer shall, in consultation with the Employee, revise the contract to reflect the change and notify the Employee of the change in writing. Without agreement, neither Party can lawfully vary the terms of the contract.

34. The Respondent has not tabled before the Court, minutes of any meeting where the Respondent consulted them. Respondent's decision was unilateral.

35. In ***Kenya County Government Workers Union v. Wajir County Government & Another [2020] e-KLR,*** the Court held that the unilateral decision of the Employer to effect salary cut, offends the provision of Section 10[5] of the Employment Act, and amounts to constructive dismissal. The Petitioners urge the Court to take persuasion from this decision, and find that the Respondent's decision similarly, offends the provision, and violates Article 41 of the Constitution.

36. They were not consulted on categorization of the Staff. The Petitioners recognize that Employers have managerial prerogative to categorize their Employees. The Court in ***Kenya Game Hunting and Safari Workers Union v. Lewa Wildlife Conservancy Limited [2014]*** acknowledged however, that this principle is subject to reasonable restrictions in a constitutional democracy. Managerial prerogative should not be exercised arbitrarily. The Petitioners were not advised where they lie in the categories created by the Respondent. There was no rationale, for the percentages adopted, in salary cut. They were discriminated against, as they have the same professional qualifications, as their comparators. They teach the same Students. Discrimination at the workplace is unlawful and unconstitutional. The Petitioners cite the decision of this Court in ***Aviation and Allied Workers Union v. Kenya Airways Limited & 3 others [2012] e-KLR***, a decision which has since been overturned by the Court of Appeal, in submitting that consultation at the workplace is a fundamental principle.

37. The Court is prayed to admonish the Respondent and declare that Respondent's actions, amount to unfair labour practices.

38. On their Application for Contempt of Court, which was not transmitted to the Trial Judge, the Petitioners submit that the Parties recorded a consent order on 5th June 2020, restraining the Respondent from discriminating against the Petitioners with regard to matters arising out of their employment. The Respondent disobeyed an order of the Court consensually recorded, by continuing to reduce the Petitioners' salary by 65%. They expected the consent order to usher in fresh engagement between the Parties, or at worst, result in equalization of the salary cut, at 45% across the board.

39. Using Shakespearean language, the Petitioners submit that consent orders ought to be placed on a higher pedestal than judicially-imposed orders, because in filing consent, Parties tell the Court: *''this is what we both want…we commit to this and you can hold us to our bond.''*

40. They conclude their Submissions, in Act 3, Scene 3, of Shakespeare's **Merchant of Venice**, where Shylock, just like the Petitioners before the Court, emphasizes the need for Parties to be held to their end of a bargain they willingly committed to:

> *I'll have my bond, Speak not against my bond.*
>
> *I have sworn an oath that I will have my bond. I'll have my bond. I will not hear thee speak.*
>
> *I'll have my bond, and therefore speak no more.*

<u>Respondent's Submissions</u>

41. The Respondent submits that the Further Affidavit filed by the Petitioners, is improperly on the record, having been filed without the leave of the Court. It also objects to irregular prosecution of, and submission on, the Application for Contempt, by the Petitioners. It is submitted that the Further Affidavit, and the purported Contempt of Court proceedings, are in violation of the procedural orders issued by the Court on the manner of disposal.

42. On the substantive Petition, the Respondent submits that the Petitioners do not have an absolute right to bring this Petition. They have not

met the threshold set out under Rule 4 of Constitution of Kenya [Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution] Practice and Procedure Rules [Mutunga Rules], as read with Article 258 of the Constitution.

43. The Petitioners are a meagre percentage of the 136 Staff, working for the Respondent. They are Senior School Teachers, with individual and terminable contracts. These contracts were individually negotiated and concluded. Their obligations with the Respondent are individual. They are not covered by any Collective Bargaining Agreement. None comes to Court under the banner of public interest. They are not a distinct class from the other Teachers, nor are they an association acting on behalf of one, or more of its Members. The Petition is misguided. The Petitioners ought to have lodged a Claim.

44. Relying on the Kenyan *locus classicus* ***Anarita Karimi Njeru v. Republic [1979] e-KLR,*** the Respondent submits that a Petitioner should always set out with reasonable degree of precision, that which he complains has been violated, the provision alleged to be violated, and the manner of violation. This decision has been cited with approval in recent cases involving ***Kenya Bus Services Limited & 2 others v. Attorney- General & 2 others [2005] e-KLR*** and ***Stanley Matiba v. Attorney-General [H.C. Misc. App. No. 666 of 1990***]. It is not enough to allege infringement of the Constitution, without particularizing the details and manner of infringement.

45. The Petitioners are still in employment. They seek to stop deduction of salary which has already been made. They also seek an additional order of unsubstantiated damages. The Respondent relies on the Court of Appeal decision in ***Kenya Airways v. Wainaina Mbugua [2019] e-KLR,*** and Industrial Court decision in ***GMV v Bank of Africa Kenya Limited [2013] e-KLR*** where it was held that, Employees should not seek multiple remedies for the same wrongful act of their Employers. The Petitioners seek specific performance, as well as general damages.

46. The Petitioners' claim is that the Respondent has breached their respective contracts, pursuant to Section 10 [5] of the Employment Act 2007. Remedy should be pursued from the Employment Act and the Employment and Labour Relations Court Act. The Petition is in abuse of the court process.

47. The Respondent has explained in its Replying Affidavit, why it is necessary to have pay-cuts. The reason is valid, not pretextual. The prevailing Covid-19 pandemic affects not only Kenya, but the entire world economy. The Petitioners acknowledge this fact in their Closing Submissions, at paragraph 40 where they submit, *'' in closing, the Petitioners have been candid that they are aware of the challenges brought about by Covid-19 crisis, to the Respondent…''* They abandon their plea for damages at large, submitting that they seek damages equivalent of their May and June 2020 full salaries.

48. The Respondent has not discriminated against any Teacher. The Parties agreed to a course of action meant to keep the business sustainable, and the Employees at work. It is only the Petitioners who have disputed the propriety of that course of action.

49. The Respondent submits that, there is no Contempt shown in the defective Application of the Petitioners. Courts have held that the standard of proof in contempt proceedings, must be higher than proof on the balance of probability, almost, but not beyond reasonable doubt. The Respondent asks the Court to dismiss the Petition and the Application with costs.

50. The issues as understood by the Court are:

a. Whether there is, a valid Application for Contempt of Court.

b. Whether the Petitioners have capacity to bring the Petition.

c. Whether they have established constitutional or statutory violation to justify reliefs sought.

<u>The Court Finds:</u> -

51. There was no Application for Contempt placed before the Court, at the time the last directions issued, on the mode of disposal of the Petition, and the Application for Interim Measures

52. There was indeed no Application for Contempt, transmitted to the undersigned Judge at any time. The Deputy Registrar of the Court who transmitted all the other Pleadings and Documents, has at the time of writing this Judgment, confirmed that he did not receive any Application for Contempt.

53. From the Submissions made on the subject however, it is not shown in what way, the Respondent violated the terms of the Consent. Ideally, if indeed there was non-compliance with any order of the Court, the Petitioners ought to have moved the Court to defer all else, in particular, implementation of the orders for disposal of the Petition, and pursue their Application for Contempt first. A Party accused of Contempt, must be given a fair chance to defend the accusations. The Petitioners gave the Respondent no room at all, to respond to Contempt allegations. They seem to have filed their Application for Contempt, very close to the date the Court issued final orders on the mode of disposal of the substantive Petition, and the date the Respondent filed its Replying Affidavit to the Petition.

54. The Further Affidavit similarly appears to have been filed, outside the scope of the Orders made on the manner of disposal. It gave no room to the Respondent, to file any response on the fresh issues raised. No leave was sought from the Court. Rule 21 [2] of Mutunga Rules requires that a Party who wishes to file further information, after pleading is closed, to do so with the leave of the Court. The correct approach, if the Petitioners felt there was need to file Further Affidavit, or file further information, would have been to seek leave of the Court, and seek deferment of the orders issued on disposal of the Petition, to allow Parties ventilate intervening disputes.

55. The Petitioners appear to have taken too much liberty in filing of their Pleadings, with the result that they acted in abuse of the process of the Court.

56. The Court does not find the Respondent to have acted in Contempt of the Court. The Further Affidavit sworn by the 1st Petitioner is irregularly on record and is hereby expunged from the record.

57. There is no doubt that the Petitioners have the capacity to bring this Petition. Article 22 of the Constitution states that '' *every person has the right to institute court proceedings, claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or is threatened.''*

58. The Petitioners do not have to be an association. They do not have to act in combination, or be members, of any interest group or class of persons. They do not have to approach the Court in the public interest. The Article, as well as the Mutunga Rules, and the Employment and Labour Relations Court [Procedure] Rules 2016, grant the Petitioners a direct ticket to approach the Court in seeking protection under the Constitution of Kenya.

59. Rule 7 of this Court Procedure Rules, allows a person to seek enforcement of any constitutional rights and freedoms or any constitutional provision, in a Statement of Claim or other Suit filed before the Court. The procedure in bringing Constitutional Petitions, has been broadened. There are no procedural restrictions, or purist approaches to Court, such as are opined to exist, by the Respondent

60. The Mutunga Rules define a person to include an individual, organization, company, association or any other body of persons, whether incorporated or unincorporated. Rule 4 of the Mutunga Rules allows any person to petition the Court, acting in their own interest, or the interest of other persons.

61. The Petitioners have satisfied the standard of precision set under ***Anarita Karimi Njeru***. The Articles said to have been contravened have been clearly set out in the title to the Petition, and given elucidation in the Petition, as captured at paragraph 12 of this Judgment. The Respondent does not indicate what is imprecise in the Petition, and did not call for any particulars from the Petitioners, prior to the Court giving directions on disposal of the Petition.

62. Should the Petitioners have presented a Claim, instead of a Petition? Courts have not placed much distinction between ordinary Claims and Petitions. Petitions are hardly rejected on the ground that they should have been presented as Claims, neither are Claims rejected on the ground that they should have been presented as Petitions. The submission by the Respondent that the Petitioners should have filed a Claim, rather than a disguised Petition, appears no longer legally tenable. The legal position expressed in earlier decisions of this Court, such as ***GMV v Bank of Africa***, cited by the Respondent above, appears to have shifted. This is mainly due to passage of Procedural Rules mentioned at paragraph 53 of this Judgment. Rule 7 of the E&LRC [Procedure] Rules allows a party to have a constitutional remedy, whether the approach to Court is through a Petition or a Claim. If remedy can be obtained either way, it makes no sense to demand that a Party comes to Court, through one procedure over the other. Petitions have become just another mode at the disposal of aggrieved persons, to seek remedies from the Court. There is little or no difference, between a Petition and a Statement of Claim, under the Employment and Labour Relations Court [Procedure] Rules 2016. The Mutunga Rules state their overriding objective is access to justice. The Constitution has been transformed into a tool for everyday litigation.

63. Do the facts show statutory or constitutional breach?

64. The facts as agreed by the Parties fall within a very narrow compass. The Petitioners, are Teachers working for the Respondent. In March 2020, the Government of Kenya, in line with World Health Organization guidelines, ordered closure of Schools, and other Public Institutions, as a measure of Covid-19 containment. The Respondent convened virtual staff meetings. The Parties discussed how learning would continue, without placing at risk, the lives of the Learners and their Teachers. These meetings are acknowledged to have taken place by both Parties. It is disconcerting for the Petitioners to submit, that there are no minutes showing that the meetings took place. They acknowledge the meetings took place elsewhere in the Petition and Supporting Affidavit.

65. It was after these meetings, that the Respondent came up with 3 categories of staff: Essential; Non-Essential; and Critical. Essential Staff would have 45% pay reduction, while Non-Essential would have 65% pay reduction, beginning the end of the month of May 2020. There was no word on Critical Staff. The Respondent gave Staff a period of consultation and mental adjustment, between March 2020 when the Government officially shut down parts of the Country and Institutions, and May 2020 when the pay-cut decision was to take effect. There was no knee-jerk reaction.

66. One of the complaints by the Petitioners is that they were not informed which category they fell in. They state however, that they were subjected to 65% pay reduction, which should have answered their question on which category they were placed.

67. The Respondent put in place virtual learning, and understandably, not all Teachers could be accommodated in VLE. The Respondent was compelled to reduce the number of lessons. There was pressure from Parents to further reduce fees, which had already recently been reduced. The Respondent has no other revenue streams. It is a private Institution, unsupported by the Government, sustaining its operations through school fees. It was faced with demands from the Staff to retain normal salaries on the one part, and demands from the Parents and Guardians, for further reduction of fees. The Respondent was clearly placed between the hammer and the anvil.

68. The Court notes that the Government has declared the rest of the entire 2020 school calendar, completely wasted by Covid-19. There is no more physical learning in any School. There are no co-curricular activities going on. Where are private Schools expected to finance their wage bills from? The Government has not put in place any substantial relief package to cushion private businesses, against the havoc wrought by the pandemic. There is no program worthy of note from the Government, injecting liquidity in the private sector. Private Schools are on their own. Teachers' salaries are not paid in equal ratio to the fees paid by Parents. There are other costs in running a School, beyond remuneration of the Teachers and other Staff. It is illogical for the Petitioners to equate percentage of their pay-cut, to the percentage in the school fees reduction. It is impossible for the Respondent to predict when the public health problem will be resolved. It cannot be said with certainty therefore, when the pay structure will revert to the period before May 2020. The Petitioners concede, as captured at paragraph 30 of this Judgment, that Covid-19 has ushered in unpredictable times. They recognize extraordinary steps businesses have been compelled to take, to keep afloat in unpredictable times. Yet, they demand predictability from the Respondent.

69. There is evidence that consultations took place as required under Section 10 [5] of the Employment Act, before the Respondent implemented the pay-cut decision. There were virtual meetings. The decision was not unilateral, but discussed with about 136 Employees of the Respondent. Only the Petitioners have found it necessary to mount a challenge to the decision and the process leading to that decision.

70. Section 10 [5] does not require that there is agreement on revision of contract, between an Employer and an Employee, as the Petitioners submit. It states, '' *Where any matter stipulated in subsection [1] changes, the Employer shall, in consultation with the Employee, revise the contract to reflect the change and notify the Employee of change in writing.*'' The provision does not require, that consultation ends up in agreement. All that the Employer is required to do, in changing terms of the contract, is to **consult** the Employee; **revise the contract to reflect the change;** and **notify the Employee about the change.** The word *'agreement'* does not feature in Section 10 (1) of the Employment Act. There would be no requirement for notification, if agreement has already been reached. The Employee is free to take the revised contract, or reject it. It is not correct that if the Employee declines the revised terms, termination would invariably amount to constructive dismissal. In constructive dismissal, the leading decision is from the Court of Appeal of Kenya, in ***Coca Cola East and Central Africa Limited v. Maria Kagai Ligaga [2015] e-KLR***. The principle, it was held, involves the Employee resigning, as a result of change in fundamental terms of the contract by the Employer, believing that the Employer is no longer desirous of being bound by the terms of the contract. The Petitioners have not resigned. For them to claim under constructive dismissal, they ought to have resigned within a reasonable time of the decision made by the Respondent. There is no constructive dismissal, without resignation by the Employee. The presence of constructive dismissal is tested against facts given by the Parties, after the Employee has resigned. The Employer must be shown to have created an intolerable work environment. The Employee must believe that the Employer is no longer interested in honouring the contract. In this Petition, the Employer has not created any unbearable work environment; it has been forced to take a decision, within the law, by the outbreak of a global pandemic. If there is an unbearable work environment, its creator is nature, not either of the Parties. The Employer has not been shown, to no longer be desirous, of upholding the contract of employment. It has bent backwards to retain the Employees at work, to sustain the contract, in severely difficult economic and public health circumstances. The Petitioners are still in employment. The Court does not find the Respondent, to have acted unilaterally, or to have been under legal obligation to agree with the Petitioners, on changing of their terms of service. The case of ***Kenya Local Government Workers Union,*** cited by the Petitioners in their Submissions, relates to salary reduction, which the Court found, was not preceded by consultations. It is distinguishable from the Petition herein. It was a dispute which arose out of contracts of employment prior to the advent of Covid-19. The Employees in that decision, were rendering their labour without interruption, while the Petitioners herein have been impaired in their ability to render normal services to the Respondent. Their productivity is severely inhibited by a natural occurrence. It was not the view of the Court, in the decision cited by the Petitioners above, that Section 10[5] of the Employment Act, requires there is agreement in revision of contracts, between Employers and Employees. The Court emphasized the need for consultations.

71. The changes in the Petitioners' contracts, are neither in violation of Article 41 of the Constitution, nor Section 10 [5] of the Employment Act.

72. The Respondent has acted reasonably, sustaining 136 Employees in employment, instead of taking the approach many Employers globally, have adopted- mass layoffs. It is imprudent in the circumstances, for the Petitioners to take the stance of the Shakespearean Shylock, and demand unwaveringly, for their pound of flesh. Such demands, as Shylock learnt, have the potential for tragic ending. The Petitioners ought to be satisfied that they are still in employment, while rendering little, or no labour, to the Respondent. As they observe at paragraph 30 above, the pandemic has not spared workplaces, and has made it hard for Employers and Employees to meet mutual obligations. Many Employers have resorted to the contractual doctrines of frustration and *force majeure,* to justify non-performance. Others as observed elsewhere have opted for termination of contracts. The Respondent has taken a softer approach, revising, rather than terminating Petitioners' contracts.

IT IS ORDERED: -

a. The Petition is declined in its totality.

b. No order on the costs.

Dated, signed and released to the Parties under Covid-19 Judiciary and Ministry of Health Guidelines, at Chaka, Nyeri County, this 29th day of July 2020.

James Rika

Judge