REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO. 117 OF 2018

IN THE MATTER OF VIOLATIONS OF ARTICLES 41 & 47 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF BREACH OF SECTIONS 2 & 4 OF THE FAIR ADMINISTRATIVE ACTION ACT

IN THE MATTER OF BREACH OF SECTIONS 41, 43, 47 & 49 OF THE EMPLOYMENT ACT, 2007

IN THE MATTER OF UNLAWFUL & UNFAIR TERMINATION,

UNFAIR LABOUR PRACTICES & UNFAIR ADMINISTRATIVE

BETWEEN

MUNIR SHEIKH AHMED.....PETITIONER

- VERSUS -

NATIONAL BANK OF KENYA.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 9th October, 2020)

JUDGMENT

The Petitioner is Munir Sheikh Ahmed. He filed the petition on 26.10.2018 through Issa & Company Advocates. The petition was supported by the annexed petitioner's affidavit sworn on 26.10.2018 and the petitioner's supplementary affidavit sworn on 05.11.2019. The petitioner prayed for judgment against the respondent for:

1) A declaration that the termination of the petitioner's employment was unprocedural, unfair, unlawful, and wrongful contrary to provisions of Articles 41 and 47 of the Constitution, sections 41, 43 and 45 of the Employment Act and section 4(3) of the Fair Administrative Actions Act.

2) A declaration that the respondent breached the petitioner's right to fair labour practices, the right to a fair disciplinary and administrative process and denied the petitioner adequate time and opportunity to respond to the allegations against him.

3) An order for reinstatement of the petitioner to the position of Managing Director on the terms that he previously enjoyed for the remainder of the contract period and payment of salary and accrued benefits from April 2016 until the date of reinstatement.

4) An order for a retraction of the damaging notice of the alleged misconduct and governance issues that the respondent wrongly and recklessly attributed to the petitioner together with a suitable apology which the petitioner will approve prior to its publication.

5) In the alternative an order that the petitioner be compensated by the respondent in the sum of Kshs.453, 489, 133.00 particularised as follows:

i. Payment of salary for the remainder of the contract period being 76 months Kshs. 2, 609, 640.00 x 76 = Kshs. 198, 332, 640.00.

ii. Gratuity in lieu of pension (25% of salary) for the remaining 76 months of the contract period Kshs. 652, 410.00 x76 = Kshs.49, 583, 160.00.

iii. Utilities (Electricity, water & security) for the remaining 76 months of the contract period Kshs.125, 000 x76 =Kshs.1, 140, 000.00.

iv. Domestic servant allowance for the remaining 76 months of contract period Kshs. 15, 000.00 x 76 = Kshs. 1, 140, 000.00.

v. Entertainment allowance for the remaining 76 months of the contract period Kshs. 50,000.00 x 76 = Kshs.3, 800, 000.00.

vi. Medical insurance cover for the remaining 76 months of the contract period Kshs.133, 333.33 x 76 = Kshs. 2, 533, 333.33.

vii. Car benefit for the remainder of 76 months of the contract period Kshs. 100, 000.00 x 76 = Kshs.7, 600, 000.00.

viii. Damages for loss of career until retirement at 60 years of age, therefore for the 36 months after days of contract, Kshs. 3, 500, 000.00 x 36 = Kshs.126, 000, 000.00.

ix. General damages for degrading and inhuman treatment, mental anguish and damage to professional reputation Kshs.55, 000, 000.00.

6) Punitive and aggravated damages for malicious prosecution and lodging a false complaint with the Banking Fraud Investigation Department.

7) Interest on 5 above at court rates from April 2016 until payment in full.

8) Costs of the suit

The respondent, National Bank of Kenya, appointed Oraro & Company Advocates to act in the matter. The respondent opposed the petition by filing on 01.03.2019 the replying affidavit by Mohammed A. Hassan, filing on 11.06.2019 the further replying affidavit sworn by Fredrick Okwiri, and filing on 05.12.2019 the further affidavit sworn by Rodgers Mungumi on 27.02.2020 in response to the petitioner's further affidavit filed on 25.11.2019.

The petitioner is a professional banker with over 20 years' experience. Prior to being employed by the respondent he had served with the Standard Chartered Bank for over 18 years in various senior management roles. In 2012 he was competitively recruited to the position of Managing Director of the respondent bank. The appointment was by the letter dated 31.01.2012 for a tenure from 01.08.2012 to 31.07.2017 (being a term of 5 years). The petitioner's case is that he served with due professionalism and diligence surpassing the required standard as evaluated by the respondent's board. Thus his salary was increased per the respondent's letters dated 24.04.2014 and 23.04.2015 and he earned bonus. Further, he received the respondent's letter of commendation dated 12.09.2013 and throughout his service the respondent's board rated him in the top tier in the performance appraisal.

The petitioner received on 29.03.2016 at about 5.00pm the letter titled "**Notification of a Disciplinary Hearing and Show Cause Notice**". The letter referred to the contract of employment and the meetings with the respondent's board of directors and the external auditors on 23.03.2016 and on 24.03.2016. The letter further stated that as the petitioner was aware, the auditors revealed material differences between the bank's financial results and the annual audited accounts for the year 2015. As a result of the disparities, the letter stated that the bank's financial results appeared to have been misrepresented and did not present the correct financial position. Accordingly, the respondent was considering to terminate the respondent's contract of employment for gross misconduct occasioned by the petitioner's failure to take appropriate action to ensure the bank's financial results reflected the correct position. The letter further conveyed that the disciplinary hearing would be on 31.03.2016 at 4.00pm at the respondent's board room and the purpose was to give the petitioner an opportunity to make representations in view of the reasons being considered for his termination. He was required to make written representations to the respondent's chairman of the board of directors by 2.00pm on 31.03.2016. He was informed that he had a right to be accompanied at the disciplinary hearing by a fellow employee (who was at liberty to make written representation concurrently as the petitioner submitted his own representations) as he wished. In the meantime, the petitioner was to proceed on leave pending the conclusion of the process. The respondent published a press statement in the print media on 30.03.2015 about the compulsory leave of the petitioner and other top managers on account of pending internal audit process on the respondent's financial performance.

The petitioner replied the letter to show-cause by his letter received by the respondent on 31.03.2016 at about 1400 hours. The reply was in the following terms and effect:

a) The time allowed to respond by 2.00pm on 31.03.2016 was too short for a fair administration of disciplinary process.

b) The publication about his compulsory leave (suspension) in the print media citing governance issues as the reason for suspension effectively brought into question his professional reputation without being given a fair hearing before hand. The publication showed the board had already made up its mind and the decision had already been made in the public space through the media. Thus the process of the disciplinary hearing had been overtaken by events but he was responding to the allegations to put on record his side of the story.

c) The allegation that he failed to take appropriate action to ensure that the bank's financial results reflected the correct position and as based on the argument that the auditors revealed material differences between the bank's financial results and the annual audited accounts for the year 2015, was a general allegation with a wide scope. The allegation confused the role of auditors and meaning of audits in the conduct of statutory audits and his role as the CEO of the entity that was under audit.

d) The petitioner denied the alleged gross misconduct. Particulars of the misconduct levelled had not been set out.

e) Corporate governance is a responsibility in the overall board of the respondent. The petitioner as the CEO was in charge of the management team but did not solely bear the responsibility for any governance failures. He ensured management operated within a controlled environment overseen by controlling departments. He contested the attempt to shift or assign responsibility for governance and oversight from the board as a body to him as the CEO as collective responsibility should not be assigned to him solely.

f) Auditors validate and report the financials of the audited entity and audit is not an exact science – there exists a lot of scope for interpretation and judgement. Differences in reports can emerge from errors, corrections, omissions and interpretations and judgements. Audit adjustments do not therefore amount to gross misconduct.

g) In the instant situation the quantum of the audit adjustments, which the petitioner agreed was both material and significant had caused the concern and disproportionate reaction leading to the action taken against the petitioner and other senior managers by the respondent. The petitioner then explained why the adjustments should not cause alarm and did so upon the headings of provisions, responsibility for credit and provisioning, credit risk governance, by inspection by the Central Bank focussed on credit and loan portfolio of the Bank in 2015, and, strengthening of the respondent's credit risk management team capability capacity through enumerated measures.

h) On discrepancy between the figures per respondent's credit team and the auditors and as presented at the meeting of 23.03.2016, the petitioner noted that despite the gravity of the auditors' report, he found it curious that there had been no exit meeting with the management team as a group on the audit findings and neither were there any management response recorded or sought from the respective managers. The meeting of 23.03.2016 therefore turned out to be a preliminary auditor-auditee discussion on findings and the CCO lamented he had not been given a fair chance to make an input or his input had been disregarded. In the meeting of 24.03.2016 the CCO proved the auditors to be wrong. Further the audit had taken very long (5months) and as at 23.03.2016 it had not concluded and an interim report is the one which was being submitted.

i) He was the first competitively recruited respondent's CEO and had greatly improved the respondent's performance as CEO.

j) He had done nothing wrong to warrant his dismissal.

k) There were 16 months remaining of his current 5 years' term. His name and reputation should not therefore be soiled as it was prejudicial to his future professional undertaking. The contract of service offered more appropriate options for a fair separation.

The petitioner's case is that upon receiving the letter to show-cause, he was escorted out from office by the respondent's security team.

In the press statement in the print media on 30.03.2016 the respondent promised the public that an independent audit would be undertaken but the petitioner says he was not aware of or he did not participate in such audit but he was dismissed after the disciplinary hearing. The termination was contrary to the Employment Act, 2007 and the respondent's Human Resources Separation Policy.

The petitioner's case is that the allegations were vague, the time allowed to prepare defence was too short, and the termination was based on the interim report by the respondent's external auditors, Deloitte & Touche'. Further the respondent's decision to terminate the petitioner had been made way back in May-June 2015 when the board's Remuneration and HR Committee met several times to lay ground work for the termination. AQs at that time the respondent's interim financial statements for June 2015 and September 2015 had not been prepared so that the allegations levelled in the letter to show-cause were contemplated and executed by the board itself and the audit completed in March 2016 was only used to justify the dismissal. Further after the publication in the print media on 30.03.2016 by the respondent, the Inspector General of Police informed the public he had ordered the immediate arrest of stated senior management officers of the respondent including the petitioner.

The petitioner received the letter of summary dismissal dated 13.04.2016. The letter conveyed that the written response and representations at the hearing had been considered and the respondent's board was of the view that the allegations against the petitioner had been sufficiently proved. His contract of service was therefore terminated with immediate effect by way of summary dismissal. His terminal dues were enumerated to be salary up to 13.04.2016; accrued leave as at 13.04.2016, and any other entitlements under the contract. The terminal dues would be processed subject to clearing with the respondent. The certificate of service would be available for collection.

The petitioner's further case is that at the disciplinary hearing of 31.03.2016 the respondent's board asked him to propose reasonable terms of separation. He wrote a letter dated 04.07.2016 proposing payment of salary for the remainder of 16 months, pay in lieu of notice and rebates on the outstanding loan facilities. The petitioner says he received no reply to his proposal. He also appealed against the summary dismissal by his letter dated 04.07.2016 but he received no response.

The petitioner stated that the external audit report in issue merely raised audit adjustments which meant that the profits reported in the earlier unaudited quarterly financial statements were adjusted down in the full year audited financial statements - such audit adjustments of unaudited financial statements being a routine matter and had been happening in all prior years. The petitioner's case is that the respondent's board unfairly and maliciously used the external audit adjustments to wrongfully and maliciously purge most of the respondent's top managers. Further the petitioner's case is that the respondent deliberately mischaracterised audit adjustments of hitherto unaudited quarterly financial statements as wrong doing and misconduct by the petitioner and notwithstanding that the proposed adjustments were passed by the management in the books of the bank and reflected in the audited financial statements of the bank. Further, in May to September the Central Bank had carried out inspection of the respondent's credit portfolio and the respondent's management had made all adjustments to the credit provisions that resulted from the inspections and proposed by the inspectors from the central bank. Thus, the petitioner states that it was surprising that the external auditors came up with rather material adjustments after auditing and not raised by the Central Bank Inspectors.

The petitioner further states that on 14.07.2016 he was booked to travel for a holiday to Dubai with members of his family when he was, in a humiliating manner, arrested at JKIA, and taken to Milimani Law Courts on 15.07.2016 and released. The arrest was in connection of reports

to the Banking Fraud Investigations Department who published in the print media on 15.07.2016 that the petitioner would be arrested. The petitioner says the respondent had made a malicious report to the police because on 31.10.2017 his advocate Paul Muite SC had written to the Department and the Department's Director replied by the letter dated 01.12.2017 confirming that at the conclusion of the investigations the files had been forwarded to the DPP who in turn cleared the petitioner. Further the manner the termination was published made it impossible for him to secure alternative employment because his reputation had been damaged. He was also forced to sell his residential home due to financial difficulties.

In the further supporting affidavit, the petitioner stated the following issues:

a) The audit by Deloitte & Touché did not follow an appointment of the external auditors by the Central Bank to undertake a special audit of the respondent but it was an annual statutory and routine audit and the reports never alleged gross misconduct on the part of the petitioner.

b) The respondent's board of directors bear the legal responsibility for ensuring accuracy and timely publication of the financial statements as per the respondent's board charter of May 2006. Actual preparation of financial statements is vested in the respondent's Chief Financial Officer. Accuracy of those statements is the responsibility of the board per clause 14 of the board charter. The board reviewed and approved the publishing of the respondent's quarterly reports for June and September 2015. The petitioner and his management team acted under the direction, guidance and oversight of the respondent's board.

c) When the show-cause letter was issued, there were no on-going investigations by the Central Bank of Kenya.

d) The disciplinary process had no relationship with publication of respondent's financial statements by 31.03.2016 and the need to publish did not justify the short and unreasonable time allowed to the petitioner to prepare his defence to the vague allegations. The disciplinary hearing could have been postponed to allow more time for the preparation of the defence. The petitioner objected to the short notice both in his written reply to the show-cause letter and at the disciplinary hearing on 31.03.2016.

e) The audit by Deloitte & Touché in issue was distinct from the one the respondent referred to in the notice about the petitioner's predicament and promised to the public as published in the print media on 30.03.2016.

f) The disciplinary process was a sham because no internal investigations were undertaken per the respondent's policy prior to issuing the notice to show-cause, there were no specific allegations and no specific offences were disclosed in the show-cause notice, the response to the grave allegations was to be made within 24 hours and reasonable time was not allowed, the petitioner was not allowed to make clarifications at the disciplinary hearing and the audit report was not referred to.

g) The petitioner was entitled to appeal against the summary dismissal but the dismissal letter never invited him to appeal and his letter of 04.07.2019 was premised on the respondent's separation policy in an attempt to salvage his reputation.

h) The opinion of the external auditors was not part of the disciplinary process.

i) The respondent soiled the petitioner's name and professional reputation by placing adverts in the media to allege misconduct even before the disciplinary hearing and even before the petitioner had an opportunity to respond to the letter to show-cause.

j) The claim by the respondent that that the minutes of the respondent's board relating to the petitioner's disciplinary hearing and dismissal process were confidential is without any basis in law and in fact and that the respondent was under duty to disclose the minutes.

k) The affidavit by Fredrick Okwiri, CPA-K does not state or support the respondent's allegations of gross misconduct on the part of the petitioner. The affidavit shows that the routine annual and external audit was conducted per prevailing standards.

The respondent's case is as follows:

a) There is no dispute that the parties were in a contract of service as pleaded for the petitioner. There is also no dispute that the petitioner was subjected to disciplinary process as pleaded and as per the show-cause letter, the petitioner's reply thereto, the disciplinary hearing and the subsequent letter of summary dismissal.

b) The replying affidavit by Fredrick Okwiri, a partner at Deloitte & Touché and a Certified Public Accountant, Kenya (CPA-K) confirms that the external audit in issue commenced about November 2015. He confirmed that the reports for the respondent's external audit for the year ended 31.12.2015 were issued to management and board of directors as is the normal practice to issue an annual report to management to highlight any management weaknesses or findings. In the process of auditing the respondent for the year ended 31.12.2015 the external auditors held numerous sessions with the management team lead by the petitioner as the CEO and they discussed about information to be included in the audit report. The audit process culminated in a meeting between the auditors and the respondent's board of directors held on 23.03.2016, 24.03.2016 and 26.03.2016. The meetings were for closure of the external audit for the respondent's financial year ended on 31.12.2015. In the process the audit findings were discussed and adjustments were made by the management to the financial statement of the bank, the respondent. The results of the year reflected in the final financial statements amounted to a loss of Kshs.1, 153, 477, 000.00 for the year ended 31.12.2015. Further it is stated that the underlying basis of the external audit findings that led to the adjustments were discussed with the management and the board of directors and they made the final decisions regarding the adjustments to the financial statements.

c) The bank's interim financial statements for June 2015 and September 2015 erroneously showed that the bank was making profits

whereas the final reports indicated actual losses. Thus following the external audit report, the respondent's June 2015 and September 2015 accounts had to be adjusted.

d) Sometimes in 2015 there were whistle-blower reports sent to Central Bank of Kenya and Capital Markets Authority and on social media about alleged fraud within the respondent. The Central Bank acted by causing an independent audit of the respondent by Delloite Kenya, the external audit firm instructed by the Central Bank of Kenya.

e) At the time of issuance of the letter to show cause the matter was subject to investigation by the Central Bank of Kenya. The respondent was required by the Central Bank of Kenya and Capital Markets Authority to publish its accounts by 31.03.2016. Thus, owing to the urgency to publish the accounts by 31.03.2016 and the accounts being crucial matters concerning the respondent, the petitioner's disciplinary hearing was scheduled for 31.03.2016.

f) The respondent's board was not in a position to establish the misrepresentation of the interim financial statements at the time the same was presented by the petitioner and his team. The misrepresentation came to light only after the external audit.

g) The petitioner never asked for more time to prepare his defence or further particulars of the allegations.

h) It is the petitioner who had required respondent's staff escorted out of office by the security after termination like in the case of **Emma Mwongeli Mwema –Versus- National Bank of Kenya Limited [2019] eKLR** . However, in his case he was not escorted out in a humiliating manner as alleged.

l) The Court should not entertain matters that were supposed to be ventilated at the disciplinary hearing but were not raised such as that disciplinary process was a sham because no internal investigations were undertaken per the respondent's policy prior to issuing the notice to show-cause, there were no specific allegations and no specific offences were disclosed in the show-cause notice, the response to the grave allegations was to be made within 24 hours and reasonable time was not allowed, the petitioner was not allowed to make clarifications at the disciplinary hearing and the audit report was not referred to. The boar was the final authority and no appeals body existed for the respondent's case which the board had considered and decided.

m) The Board did not decide to terminate the petitioner's employment at meetings held sometimes in 2015 as alleged for the petitioner.

n) The audit report by Deloitte was confidential and the petitioner was terminated on the basis of misrepresentation of the bank's financial statements.

o) The respondent's reputation seriously suffered due to the petitioner's misrepresentation of the financial statements.

p) The respondent never requested the petitioner to make representations on the possible or reasonable terms of separation.

The parties filed their respective final submissions as was directed by the Court. The Court has considered all the material on record and makes the pertinent findings as follows.

To answer the **1st issue** for determination, there is no dispute that the parties were in a contract of service per the agreement of employment made and signed on 31.05.2012. The respondent employed the petitioner as Managing Director from 01.08.2012 to 31.07.2017 being a fixed term contract of 5 years.

To answer the **2nd issue** for determination, the Court finds that there is no dispute that the contract of service was terminated by the letter of summary dismissal dated 13.04.2016 on account that in view of the allegations made against the petitioner by the respondent had been sufficiently proved.

The **3rd issue** for determination is whether the termination was unfair and in violation of the petitioner's constitutional rights as was alleged.

The petitioner's case is that the Fair Administrative Action Act 4 of 2015 was enacted to give effect to Article 47 of the Constitution. Article 47(1) provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Article 47(2) provides that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has a right to be given written reasons for the action. Section 2(ii) of the Fair Administrative Action Act 4 of 2015 provides that administrative action includes any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates. Section 4(3) of the Act provides, *inter alia*, that 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 prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and make representations in that regard, and information, materials and evidence to be relied upon in making the decision or taking the administrative action. The petitioner also cites Article 41 of the Constitution which states that every person has a right to fair labour practices.

It is urged for the petitioner that he was entitled to but was denied by the respondent his right to a lawful, reasonable and procedural disciplinary process in contravention of Articles 47 and 41 of the Constitution, sections 43 and 45 of the Employment Act, 2007 and sections 4(1) of the Fair Administrative Actions Act 4 of 2015. The petitioner's case is that he lamented about shortness of time to prepare his defence and his termination was predetermined and he was invited for disciplinary hearing without compliance with section 41 of the Employment Act, 2007.

The respondent submits that the dispute was based on the contract of employment and the respondent clearly complied with the procedural

provisions under section 41 of the Employment Act, 2007 because a letter to show-cause issued, the petitioner replied, a disciplinary hearing took place and the decision on summary dismissal was made and conveyed to the petitioner. The right of appeal was untenable because the respondent's highest authority (the board) had considered and terminated the claimant so that the summary dismissal rendered the respondent *functus officio*. Further the necessity to publish the respondent's accounts by 31.03.2016 required that the disciplinary process is concluded by 31.03.2016.

In the reply to the letter to show cause, the petitioner lamented that the time allowed to prepare his defence was short. He states that he raised the same issue at the disciplinary hearing. The respondent failed to exhibit the minutes of the disciplinary hearing. Accordingly, the Court finds no reason to doubt the petitioner's account of his objection to the short time of 24 hours allowed to prepare his defence prior to making a substantive written response and subsequently appearing for the disciplinary hearing. The Court further finds that the necessity for the respondent to publish its statements of its financial accounts by 31.03.2016 has not been shown to have any relationship as a justification for the hurried disciplinary proceedings especially in circumstances whereby the petitioner had also objected that the allegations were vague and without particulars and the respondent not having shown its efforts to rectify the situation. The Court therefore finds that while the respondent purported to comply with section 41 of the Employment Act, 2007 on a notice and hearing prior to the termination, the petitioner was seriously prejudiced in view of the very short time allowed to prepare the defence and in view of the otherwise vague allegations devoid of due particulars and as the petitioner had objected to.

Further, the Court finds that the respondent's media publication on the petitioner's compulsory leave prior to the hearing and determination of the disciplinary case constituted manifest injustice to the petitioner in an otherwise contractual disciplinary process which was a confidential internal proceeding between the parties as per their contract of service and sound fair labour practice. The Court considers that it is unfair labour practice for an employer, without good cause or reason, to publicise and publish adverse material about its employee in view of the contract of service and its execution as it was done in the present case, and, such publication, in the Court's opinion, amounts to unfair labour practice. Thus, the Court finds that it was a valid concern when the petitioner urged that the respondent's publication of the matter on 30.03.2016 and without undertaking the internal fair, transparent and independent audit process as promised in the public notice prior to his dismissal amounted to a predetermined decision by the respondent to dismiss the petitioner. While finding for the respondent that the appeal process was superfluous in the circumstance that the peak authority, the board, had determined the case, in view of the other findings by the Court on the issue, the procedure adopted failed to comply with provisions of Article 47 on fair administrative action and Article 41 on the fair labour practice.

Turning to the other limb of the matter, was the summary dismissal otherwise fair on merits? Has the respondent established that the reason for termination existed as envisaged in sections 43 and 45 of the Employment Act, 2007? The reason for termination as per the letter to show cause was the alleged gross misconduct occasioned by the petitioner's alleged failure to take appropriate action to ensure that the bank's financial results reflected the correct position. There is no dispute between the parties that there were material differences between the bank's financial quarterly results for 2015 and the subsequent annual audited accounts of the respondent bank with the effect that the final respondent's financial report for 2015 reported a loss after tax of Kshs. 1.2 billion and as per the report exhibited for the respondent and the statement by the Managing Director & CEO one Wilfred Musau, the loss was, "**…mainly attributed to increased bad debt provisions and higher funding costs.**" There is no mention of culpability on the part of the petitioner as occasioning the loss or providing misleading information about the loss. As urged for the petitioner and as confirmed in the affidavit by the external auditor, the adjustments leading to the reported loss were well within the normal audit practice and were agreed between the auditors and the board and the respondent's management effected the adjustments on the 2015 respondent's accounts accordingly. The Court considers that the agreement to make the adjustments was consistent with the respondent's terms of reference for the Board's Audit and Risk Committee, 2013 being exhibits MSA-19 and also MSA-17 on the supporting affidavit where it is stated that the committee shall ensure, *inter alia*, the integrity of the financial statements of the company, the effectiveness of the internal control over financial reporting, and the performance of the respondent's internal audit function and the external auditors. The court finds that in view of that committee's role, the respondent's operational requirements were that the respondent's board through the committee was collectively responsible for the accuracy of the respondent's financial statements as was urged for the petitioner so that the alleged reason for termination has not been established to have existed or been genuine and further, the alleged reason has also not been shown to have related to the petitioner's conduct and the said respondent's operational requirement as envisaged in section 45 of the Employment Act, 2007.

The Court finds that the petitioner was entitled to lament that the allegations as levelled were vague and general without specific particulars. In particular, the Court finds that the particulars of the petitioner's alleged failure to take appropriate action to ensure that the bank's financial results reflected the correct position were never provided in the show cause letter and have not been shown to have existed at all. The roles of the petitioner as the managing director of the respondent are clearly spelt out in clause 10 of the respondent's Board Charter exhibit MSA-16 of the supporting affidavit and the show cause letter leading to the summary dismissal did not refer to and establish any failures in that regard and as was generally alleged. The alleged gross misconduct has not therefore been established especially that the respondent had not in any event made an adverse appraisal report on the petitioner's performance and no warning letters are alleged or shown to have been issued. The Court finds that as urged for the petitioner, there was collective responsibility of the respondent's board for the adjustments that were made on the respondent's financial statements after the external audit and the audit report not having been exhibited, there is no reason to doubt the claimant's account that he was not mentioned as liable for the ensuing adjustments or the interim quarterly financial statements for 2015.

As submitted for the petitioner, it is found that the respondent had line managers such as the Chief Finance Officer who had been employed to specifically prepare the financial statements of the respondent. Further, there was no basis for the respondent to single out the petitioner as culpable in view of the adjustments flowing from the external audit findings in circumstances whereby, in absence of any other material on record to establish a contrary view, the adjustments were a normal step in the external audit process and the respondent's board and management had collectively owned the 2015 quarterly interim statements and then the adjustments that were made thereto after discussing and considering the external audit findings – so that the board and the management had thereby acquired a collective responsibility in that regard.

In that regard and as submitted for the petitioner, the Court follows its opinion in **Jadia M. Mwarania –Versus- Kenya Reinsurance Corporation Limited [2018] eKLR** thus,

> **"It is not in dispute that the PWC audit report was a draft and the final report was not filed or shown to have been issued at**

all. The Court further finds that the A.M. Best ranking was at organisational level and the respondent did not show how the ranking was more attributable to the sole performance of the claimant and not other employees or the respondent's Board of Directors. Further the Court finds that the claimant had a valid concern that it would be unfair to visit him with adverse consequences when clearly there had been line managers responsible for the prompt or timely action towards confirmation of the two officers who had been serving in an acting capacity. The Court further finds that there was no dispute that upon renewal of the claimant's contract of service the respondent's Board of Directors awarded the claimant a 20% salary increment subject to approval by the Government and as an administrative follow up, the Court returns that there was no established misconduct when the claimant wrote to the Chief of Staff and the Head of Public Service about the increment. In view of such findings the Court returns that the respondent's allegation of loss of trust and confidence was unfounded."

Indeed, the external auditor Fredrick Okwiri, CPA-K confirmed in his affidavit that as of practice, the audit findings were discussed with management team and the board and adjustments made. In absence of any other evidence on the subject, the Court finds that the adjustments were by the practice of external audit an inherent step as may be necessary and the Court finds that the fact of the adjustments as they were made did not by itself establish that the petitioner was liable as the managing director and CEO of the respondent for any wrong or misconduct. While the Court reckons that the subsequently reported loss of Kshs.1.2 billion reflected adversely on the respondent, its board, management and other staff, as urged for the petitioner, a return of a loss is an inherent possibility in any business enterprise and by itself (alone) does not establish misconduct or poor performance on the part of the CEO like in the case of the petitioner or indeed, against the other staff or the board. In the opinion of the Court, such reported loss and flowing from adjustments of initially unaudited financial statements may be a symptom of misconduct or poor performance on the part of the board or one or other staff but in the instant case, no such misconduct or poor performance has been established as was purportedly alleged against the petitioner.

Accordingly, the reason for termination was not established at all and the Court finds that it was unreasonable to dismiss the petitioner upon a general allegation that was never established as at the time of the summary dismissal – as it amounted to unfair labour practice under Article 41 of the Constitution as amplified in sections 43 and 45 of the Employment Act, 2007.

Further the summary dismissal has been established to have been in violation of the rule on reasonableness in making of fair administrative actions under Article 47 of the Constitution and the cited provisions of the Fair Administrative Action Act 4 of 2015 and as was urged for the petitioner. In particular, it has been established that the allegations were vague and without due particulars; prior to disciplinary hearing on 31.03.2016, the respondent published in the print media the fact of emplacing the petitioner on compulsory leave despite the pending disciplinary hearing that was otherwise confidential (by implication and nature of contracts of service) under the contract of service and fair labour practices; the respondent has not shown that prior to the disciplinary hearing and the subsequent summary dismissal it had carried out an independent internal audit and review to justify the allegations and as promised in the public notice published on 30.03.2016; and whereas the external audit led to adjustment of the respondent's 2015 interim quarterly financial statements to disclose a net significant loss, the respondent erroneously treated the loss as being singly attributable to the petitioner whereas it was within the board's and the respondent's collective responsibility. In the Court's opinion and as submitted for the petitioner, the respondent's summary dismissal of the petitioner amounted to unreasonableness in violation of Article 47 of the Constitution.

The Court finds that by imposing the summary dismissal, the respondent acted unreasonably per Lord Green in **Associated Provincial Picture Houses Limited –Versus- Wednesbury Corporation (1947) 2ALL ER 680 at 682-683** thus, **"It is true the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word 'unreasonableness' in a rather comprehensive sense. It is frequently used as general description of the things that must not be done. For instance, a person entrusted with discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey these rules he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J., I think it was, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith. In fact, all these things largely fall under one head."**

While making that finding the Court has considered the submission for the respondent that the petitioner was not just a mere employee but he was the respondent's Managing Director and CEO and he owed the respondent the leadership role as being responsible for the day to day management of the respondent and much was expected from him in terms of the duty of care, loyalty and disclosure (as was held in **Maina Mukoma –Versus- Cannon Assurance Limited [2016]eKLR** and in **Nazareno Kariuki –Versus- Feed the Children Kenya [2013]eKLR**). The evidence is that the petitioner was the respondent's managing director and he held a leadership position as submitted for the respondent but the Court finds that there is no material before the Court showing that the petitioner breached his fiduciary and contractual duties or failed on his leadership position and roles. Instead the evidence is that the petitioner played his role as managing director and the respondent's board does not deny that it approved the quarterly financial statements for 2015 that were subsequently adjusted after the findings by the external auditors. It is also not disputed that the impugned quarterly financial statements for 2015 had been subject of an inspection by the Central Bank and no significant objections had been raised about the statements until the external auditors undertook their routine annual assignment and reported otherwise. Further, the petitioner was not subsequently found culpable after the investigations by the police. All that evidence shows that as at termination, the respondent held an empty general allegation against the respondent.

In any event, in the further replying affidavit of Rogers Mungumi at paragraph 20 it was stated that the petitioner was dismissed on the basis of misrepresentation of the respondent's financial statements (misrepresentation being in the nature of a commission). The Court finds that the stated reason is at variance with the reason in the letter to show cause thus, the alleged gross misconduct occasioned by the petitioner's alleged failure to take appropriate action to ensure that the bank's financial results reflected the correct position (failure to take steps being in the nature of an omission). In any event the particulars of misrepresentation as alleged were never disclosed. The Court finds such changing or shifting accounts by the respondent on the reason for termination condense the termination as unreasonable because the contradictory accounts by the respondent in that regard cannot be trusted.

The **4th issue** for determination is whether the petitioner is entitled to the remedies as prayed for. The Court makes findings as follows.

First, the Court has found that the petitioner is entitled to the declaration that the termination of the petitioner's employment was unprocedural, unfair, unlawful, and wrongful contrary to provisions of Articles 41 and 47 of the Constitution, sections 41, 43 and 45 of the Employment Act and section 4(3) of the Fair Administrative Actions Act.

Second, the Court has found that the petitioner is entitled to the declaration that the respondent breached the petitioner's right to fair labour practices, the right to a fair disciplinary and administrative process and denied the petitioner adequate time and opportunity to respond to the allegations against him.

Third, the petitioner prays for an order for reinstatement of the petitioner to the position of Managing Director on the terms that he previously enjoyed for the remainder of the contract period and payment of salary and accrued benefits from April 2016 until the date of reinstatement. It is submitted for the respondent that section 49(3) of the Employment Act, 2007 provides that the Court should *inter alia*, consider the practicability of reinstatement or re-engagement. The respondent relies on **New Zealand Educational Institute –Versus- Board of Trustees of Auckland Normal Intermediate Schools [1994]2 ERNZ 414 (CA)** where it was stated thus, "**Whether…it would be practicable to reinstate [the employee] involves a balancing of interests of the parties and justices of their cases with regard not only to the past but more particularly to the future. It is not uncommon for this Court or its predecessor, having found a dismissal to have been unjustified, to nevertheless conclude on the evidence that it would be inappropriate in the sense of being impracticable to reinstate the employment relationship. Practicability is capability of being carried out in action, feasibility or the potential for the re-imposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence.**"

For the petitioner it was submitted that the Supreme Court in **KenFreight (E.A) Limited –Versus- Benson K. Nguti [2019]eKLR** (Mwilu DCJ & VP, Ibrahim, Wanjala, Njoki, Lenaola, SCJJ) held that the Employment Act, 2007 provides for remedies for unlawful or wrongful termination under section 49 and it is up to the judge to exercise his discretion to determine whether to allow any or all of the remedies provided thereunder. Further, the Supreme Court held that it did not matter how the termination was done and provided the same was challenged in a court of law, and where the Court found the same to be unfair or wrongful, section 49 applies. The Supreme Court further held thus, "**Guided by the above analysis, we find that once a court has reached a finding that an employer has unlawfully terminated an employee's employment, the appropriate remedy is the one provided under section 49 of the Employment Act. We also need to clarify that a payment of an award in section 49 (1) (a) is different from an award under Section 49(1) (b) and (c). Section 49 allows an award to include any or all of the listed remedies provided that a Court in making the award, exercises its discretion judiciously and is guided by section 49 (4) (m)."**

The law is as per the submissions made for the parties and the Court is guided accordingly as is bound by the decision by the Supreme Court. The Court has considered the factors in section 49(4) of the Employment Act, 2007. In the present case the Court has already found that the summary dismissal was unconstitutional, unlawful and unfair. The petitioner wishes to be reinstated. He did not contribute to his summary dismissal. However, there are serious considerations the Court has made in the instant case which the Court finds to operate as a bar to granting of an order of reinstatement. The petitioner's contract of service was lapsing on 31.07.2017 a date which has since come and gone. It could be that reinstatement would issue, despite the lapsing of the contractual term, as a measure to remedy the petitioner's plight by way of a payback that accompanies an order for reinstatement. However, section 12(3) (vii) of the Employment and Labour Relations Court Act, 2011 empowers the Court to make an order for reinstatement of any employee within three years of dismissal subject to such conditions as the Court thinks fit to impose under the circumstances contemplated under any written law. The Court returns that the dismissal having been on 13.04.2016, the three years contemplated and attached on the remedy for reinstatement by section 12(3) (vii) of the Act have since lapsed and the remedy is time barred. The Court has considered the time that has run and that the position held by the petitioner was with respect to a single office establishment and returns that practicability of reinstatement is thereby impaired. The prayer for reinstatement and the consequential payback or reimbursement will therefore be declined.

Fourth, the petitioner has prayed for an order for a retraction of the damaging notice of the alleged misconduct and governance issues that the respondent wrongly and recklessly attributed to the petitioner together with a suitable apology which the petitioner will approve prior to its publication. The respondent made no submissions on the prayer. For the petitioner it was submitted that the publication in the print media being exhibit MSA-11 should be retracted because the internal and independent review of the respondent's financial performance therein never took place towards ensuring a fair, transparent and independent audit. The Court has found that the notice published on 30.03.2016 and the disciplinary hearing having taken place on 31.03.2019 prior to the independent audit and review promised to the public showed that the summary dismissal was premeditated and it was unfair and in contravention of Articles 47 and 41 of the Constitution as urged for the petitioner. Considering the likely damage to the petitioner's professional reputation and the subsequent arrest and the finding that the summary dismissal was unfair, the Court returns that the petitioner is entitled to the order that the notice published in the print media on 30.03.2016 being exhibit MSA-11 is retracted by the respondent in so far as it referred to the petitioner and the respondent to publish a notice of the retraction, in the like print media, as well as form and content approved by the petitioner's advocates.

Fifth, in the alternative the petitioner prayed for an order that the petitioner be compensated by the respondent in the sum of Kshs.453, 489, 133.00. The petitioner has prayed for

i. Payment of salary for the remainder of the contract period being 76 months Kshs. 2, 609, 640.00 x 76 = Kshs. 198, 332, 640.00.

ii. Gratuity in lieu of pension (25% of salary) for the remaining 76 months of the contract period Kshs. 652, 410.00 x76 = Kshs.49, 583, 160.00.

iii. Utilities (Electricity, water & security) for the remaining 76 months of the contract period Kshs.125, 000 x76 =Kshs.1, 140, 000.00.

iv. Domestic servant allowance for the remaining 76 months of contract period Kshs. 15, 000.00 x 76 = Kshs. 1, 140, 000.00.

v. Entertainment allowance for the remaining 76 months of the contract period Kshs. 50,000.00 x 76 = Kshs.3, 800, 000.00.

vi. Medical insurance cover for the remaining 76 months of the contract period Kshs.133, 333.33 x 76 = Kshs. 2, 533, 333.33.

vii. Car benefit for the remainder of 76 months of the contract period Kshs. 100, 000.00 x 76 = Kshs.7, 600, 000.00.

It is submitted for the petitioner that under section 49 (4) of the Employment Act, 2007, some of the factors the Court should consider in making an award include the wishes of the employee, the reasonable expectation of the employee as to the length of the time for which his employment with that employer might have continued but for termination, and the opportunities available to the employee for securing comparable or suitable employment with another employer. It is further submitted that the petitioner's monthly salary was Kshs.2, 145, 000.00 and other benefits included utility bills Kshs. 125, 000.00, Kshs. 15, 000.00 for domestic servant, entertainment allowance of Kshs. 50, 000.00, medical cover of Kshs.133, 333.33 and fully serviced car benefit of Kshs. 100,000.00. The Court finds that as per the evidence, the termination was on 13.04.2016 and the contract was lapsing on 31.07.2017 - so that there were 15 months and about 8 days of unexpired tenure. The Court finds that the petitioner has not justified the claim and submission that the unexpired tenure was for 76 months as claimed and alleged. On that account alone the amount claimed for the unexpired tenure of 76 months upon the various headings will collapse. Further, the Court considers that the order for reinstatement having been found untenable in the circumstances of the case, the submission for the respondent that the benefits flowing from the contract of service ceased to be available consequential to the summary dismissal on 13.04.2016 is upheld.

Fifth, the petitioner prayed for damages for loss of career until retirement at 60 years of age, therefore for the 36 months after days of contract, Kshs. 3, 500, 000.00 x 36 = Kshs.126, 000, 000.00. It was submitted for the petitioner that after his unlawful termination had been unable to find alternative employment of equal status as a result of the malicious and damaging press the respondent published to tarnish the petitioner's reputation. For the respondent it was submitted that the Court should be guided by the holding in **CMC Aviation Limited – Versus- Mohammed Noor Civil Appeal No. 199 of 2013** that the appellant had not complied with requirements of sections 41 and 45 of the Employment Act, 2007 and the dismissal was found unfair but it was held that the petitioner was not entitled to 12 months' gross pay in compensation for wrongful termination. The Court in that case further held that since the contract was terminable by one-month notice, the Court believed that an award of one month's salary in lieu of notice would have been reasonable compensation and the award of 12 months' gross pay by the trial Court was set aside by the Court of Appeal in its entirety.

It was further submitted for the respondent that in **Abraham Gumba-Versus- Kenya Medical Supplies Authority [2014]e KLR** the Court explained the rationale for capping monetary damages at 12 months thus, " **The employment relationship is not a commercial relationship, but a special relationship, which must be insulated from the greed associated with the profit-making motives, inherent in commercial contracts. This has been the historical justification of capping compensatory damages since the era of the trade Disputes Act Cap. 234 the Laws of Kenya, to a maximum of 12 months' salary…. This Court is of the view that in general, judicial restraint must be exercised in exceeding the capping of 12 months' salary, in compensating Employees for the wrongful acts of their Employers. The proliferation of monetary damages above the equivalent of 12 months' salary will only disturb the equilibrium intended to be achieved by Parliament, in placing the capping. The Industrial Court (Procedure) Rules 2010 expressly state that the Court should not award exemplary or punitive costs in employment cases, and this Court would like to believe this intention even in the area of damages**."

Further **Standard Group Limited –Versus- Jenny Luesby [2018]e KLR** was cited for the respondent and where the Court held that compensatory awards are not meant to be a punishment for the employer, but rather an attempt to offset the financial loss resulting from the wrongful act of the employer.

The Court has considered the respective submissions made for the parties. The Court finds that the prayer for damages for loss of career until retirement at 60 years of age, therefore for the 36 months after days of contract, Kshs. 3, 500, 000.00 x 36 = Kshs.126, 000, 000.00 is clearly outside the statutory provisions in section 49 of the Employment Act, 2007 capping the compensation for unfair termination at a maximum of 12 months' gross salaries as at the time of termination.

The Court finds that the compensation for unfair termination is indeed capped at a maximum of 12 months' gross salaries under the section and the petitioner has not justified the deviation from the statutory provisions by claiming a gross monthly salary of Kshs. 3, 500, 000.00 x 36 = Kshs.126, 000, 000.00.

The Court has considered the cases cited for the respondent. The applicable law is section 49 of the Employment Act,2007. In the instant case and in view of the factors for consideration in section 49(4) the Court finds as follows.

The claimant wished to continue in employment for a remainder of 15 months and about 8 days which was beyond the statutory capping of 12 months – and the petitioner had a legitimate expectation to serve for that unexpired period. It has not been established that the petitioner contributed to his termination in any manner. The petitioner had a clean record of service of slightly below 4 years. In view of the respondent's publication on 30.03.2016 of the compulsory leave imposed against the petitioner and prior to conclusion of the disciplinary process and the ensuing publicised arrest surrounding the time of termination, the Court considers that the petitioner has established that opportunities available for him to obtain comparable or suitable employment were thereby seriously impaired. The Court finds that no material was placed before the Court to show that consequential to the summary dismissal there was failure by the petitioner to take steps to reasonably mitigate his losses attributable to the dismissal. The evidence was that after the summary dismissal the petitioner was unable to repay personal loans and he suffered financial constraints forcing him to sell his residential home. The aggravating factors against the respondent are that the summary dismissal violated the petitioner's rights as already found earlier in this judgment. The Court has also considered that under clause 18 of the agreement either party was entitled to 3 months' notice or 3 months' pay in lieu of the notice if the contract was to be voluntarily terminated prior to the lapsing of the agreed term of 5 years – and while submitting that three months' salaries were paid to the petitioner in lieu of the termination notice, the respondent has provided no evidence to establish that such payment was actually made.

Taking into account all the cited factors under section 49 of the Act as impacting on the summary dismissal, the Court finds that the petitioner has established a case for an award of 12 months' gross salaries for the unlawful, unfair and unconstitutional summary dismissal on 13.04.2016. It is submitted for the petitioner at paragraph 128 of the petitioner's submissions that his last monthly salary was Kshs. 2,

145, 000.00 as at termination plus Kshs. 15,000.00 servant allowance and Kshs. 50,000.00 and the Court finds the same to amount to a sum of **Kshs.2, 210, 000.00** as the last monthly pay. The same figures are pleaded at paragraphs 31 and 32 of the petition. The figures appear not to be in dispute and the petitioner is awarded Kshs.2, 210, 000.00 x 12 months making **Kshs.26, 520,000.00** (payable less income tax) in compensation for the unlawful and unfair loss of employment that, has as well, been found to have been unconstitutional.

Sixth, the petitioner prayed for general damages for degrading and inhuman treatment, mental anguish and damage to professional reputation Kshs.55, 000, 000.00. It is submitted that after receiving the show cause letter the petitioner was escorted from the office by the security team and he was humiliated. Further he was unable to meet his financial obligations and he sold his residential home. He was subsequently arrested in presence of his family members and in public at JKIA. It is urged and submitted for the petitioner that the impugned actions and activities amounted to degrading and inhuman treatment contrary to Article 28 of the Constitution. The Court has considered the submissions. As submitted for the respondent, the Court finds that the claims about the arrest and the actions related to the criminal justice process in this matter ought to have been directed at the National Police Service and the Attorney General or the Director of Public Prosecutions, probably in an appropriate legal action. The Court further finds that the injury to reputation including financial embarrassment forcing him to sell his residential house as the petitioner may have suffered has already been taken into account in awarding the petitioner the maximum 12 months' salaries under section 49 of the Employment Act, 2007. The prayer for general damages for degrading and inhuman treatment, mental anguish and damage to professional reputation Kshs.55, 000, 000.00 will therefore be declined.

Seventh, the petitioner prayed for punitive and aggravated damages for malicious prosecution and lodging a false complaint with the Banking Fraud Investigation Department. As already found by the Court and as submitted for the respondent, an action for malicious prosecution would be made against the Director of Public Prosecutions (or the Attorney General as the public prosecutor under the former Constitution as was held in **Jediel Nyaga –Versus- Silas Mucheke Civil Appeal No. 59 of 1987**) and not the respondent. The prayer for the aggravated and punitive damages will therefore fail.

Parties made considerable submissions on the alleged breach of the right of access to information under Article 35 of the Constitution and Article 28 of the Constitution on the right to dignity and which the Court considers already determined by the earlier findings in this judgment. The Court considers that while the petitioner was not provided with the necessary opportunity or time to prepare his defence, it is sufficient that the Court has found that the termination was unfair. The petitioner's advocates demanded for provision of information or documents leading to the dismissal and the Court has already awarded the petitioner for the unfair dismissal and the Court will not delve in the matter further especially that no specific prayer was made about the alleged violation of Article 35 and towards provision of the information in issue. Similarly, the matters raised under the alleged violation of Article 28 have been subsumed in the Court's findings about the established violation of Articles 41 and 47 and the Court will not delve further in the matter as sufficient remedy has already been awarded.

The respondent in its submissions revisited the issue whether the petitioner ought to have filed an ordinary action and not the petition. The Court finds that the issue is *res judicata* in view of the ruling delivered herein on 20.12.2018 with respect to the preliminary objection that had been raised for the respondent on the same issue. In any event, the Court has found that the petitioner's constitutional rights had been violated and nothing barred him from urging his case as was done.

As the petitioner has succeeded in his petition, the respondent will pay the costs of the proceedings.

In conclusion, judgment is hereby entered for the petitioner against the respondent for:

1) The declaration that the termination of the petitioner's employment was unprocedural, unfair, unlawful, and wrongful as it was contrary to provisions of Articles 41 and 47 of the Constitution, sections 41, 43 and 45 of the Employment Act and section 4(3) of the Fair Administrative Actions Act.

2) The declaration that the respondent breached the petitioner's right to fair labour practices, the right to a fair disciplinary and administrative processes and denied the petitioner adequate time and opportunity to respond to the allegations against him.

3) The notice published in the print media on 30.03.2016 being exhibit MSA-11 be retracted by the respondent in so far as it referred to the petitioner and the respondent to publish a notice of the retraction, in the like print media, as well as, in a form and content, approved by the petitioner's advocates.

4) The respondent to pay the petitioner a sum of **Kshs.26, 520,000.00** (less due PAYE) by 15.12.2020 failing interest at Court rates to run thereon from the date of this judgment until full payment.

5) In view of the prevailing Covid 19 situation, there be stay of execution of the judgment and decree herein until 15.12.2020 and only with respect to order 4 above.

6) The respondent to pay the petitioner's costs of the proceedings.

Signed, dated and delivered by the court at Nairobi by video-link this Friday 9th October, 2020.

BYRAM ONGAYA

JUDGE