



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1329 OF 2016

MATHEW MUNYAO.....CLAIMANT

- VERSUS -

THE NATIONAL TRANSPORT & SAFETY AUTHORITY.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 4th January, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 06.07.2016 through Michuki & Michuki Advocates and learned Counsel Mr. David Muthee Michuki appeared in that regard. The claimant prayed for judgment against the respondent for:

- i. A declaration that the respondent's actions culminating in the termination of the claimant's employment were unconstitutional and in total violation of the claimant's rights to fair administrative action and a fair hearing.
- ii. A declaration that the respondent's actions have infringed on the claimant's legitimate expectation that as a public authority the respondent would uphold the principles of fairness, equality, good governance and natural justice and constitutionalism.
- iii. A declaration that the respondent's action to terminate the claimant's employment was unfair within the meaning of section 45 of the Employment Act and therefore the termination grossly unfair.
- iv. An order that the respondent does reinstate the claimant to his position as Director Road Safety forthwith.
- v. The respondent does make the following financial compensation to the claimant:
 - a. Unpaid salary for the month of February to June 2016 at Kshs. 460, 580.00 x 4 making Kshs. 1, 842, 320.00.
 - b. 12 months' salaries being damages for unfair termination Kshs. 460, 580.00 x 12 making Kshs. 5, 526, 960.00.
 - c. General damages for breach of contract and infringement of basic rights.
 - d. Costs of the suit.
 - e. Any other relief the honourable Court may deem fit to grant.

The respondent's case is based on the amended memorandum of response and counterclaim filed on 25.01.2018 through Prof. Albert Mumma & Company Advocates and learned Counsel Mr. Agwara appeared in that regard. The respondent prayed that the claimant's memorandum of claim be dismissed with costs and prayed that judgment be entered against the claimant for:

- a. A declaration that the claimant's termination by the respondent was lawful and fair and strictly complied with Article 47 & 50 of the Constitution of Kenya and sections 41, 42, and 45(2) of the Employment Act, 2007.
- b. A permanent injunction be issued restraining the claimant by himself, his agents, servants, employees or otherwise howsoever from harassing the respondent's employees, disclosing the respondent's confidential information, causing to be published or publishing disparaging materials about the respondent, disparaging the respondent's reputation by making false claims against the respondent on internet, newspapers, Facebook, Twitter, YouTube, WhatsApp, or any other medium whatsoever or in any manner

whatsoever pursuing any conduct designed to undermine the respondent's statutory mandate.

c. An order of the Honourable Court do issue to the claimant to forthwith remove from Facebook, Twitter, YouTube, WhatsApp, or any other medium whatsoever or in any manner whatsoever pursuing any conduct designed to undermine the respondent's statutory mandate.

d. General damages.

e. Costs and interest on the suit.

The claimant filed the defence to counterclaim on 15.02.2018. The claimant prayed that the counterclaim be dismissed with costs.

There is no dispute that the claimant was employed by the respondent to the position of Director Road Safety as per the letter of appointment dated 24.04.2014. The claimant was to report to the respondent's Director General and the appointment was for three (3) years commencing June 2014 and the respondent's Board reserved the right to terminate the contract prematurely depending on the claimant's performance. Thus, the Court reckons that the contract would end by effluxion of time around June 2017.

By the letter dated 28.07.2015 the Principal Secretary in the Ministry of Transport and Infrastructure wrote to the Chairman of the respondent's Board about complaints by public service vehicle (PSV) operators against the respondent's officers. The letter specifically mentioned the claimant and under his name it was stated,

“The complaints were raised on how NTSA enforcement officers are involved in corrupt practices by demanding money from operators whose vehicles are arrested during random checks. Failure to give leads to removal of number plates or tearing of licences. The officers work under Mathew Munyao. Also, Saccos suspended from operations pay bribes to him for a favourable report that will allow their return to operations.

You will recall that the Ministry wrote a letter to you, Ref. No. MOT/RDT/003/ 01/Vol. 1(12) dated 23rd October, 2014 requesting that you investigate and give feedback on malpractices within NTSA. Up to now, we have not received any response yet some of the allegations are similar. A copy is enclosed for ease of reference.

The purpose of this letter, therefore, is to request you to investigate the issues and provide us with your findings. Also include measures the board will take to end too many complaints received regarding integrity of NTSA Officers, and how they carry out enforcement.

Yours Sincerely,

Signed

Eng. John K. Mosonik, EBS

PRINCIPAL SECRETARY

The letter dated 05.08.2015 was addressed to the claimant by the respondent's Director General one Francis Meja. The letter repeated the complaints against the claimant thus:

- That enforcement the officers under the claimant's supervision are involved in corrupt practices by demanding money from operators whose vehicles are arrested during random checks. Failure to remit the monies demanded leads to the officers removing number plates or tearing licences.
- There was a specific complaint against the claimant that the claimant received or demanded monies from suspended Saccos or companies for a favourable report or recommendation in order for them to resume operations.

The letter stated that the allegations were under investigation by an ad hoc committee of the respondent's Board. The claimant was required to respond in writing by 07.08.2015 at 12.00pm and to appear before the ad hoc committee on 10.08.2015 at 08.30am, 5th Floor Boardroom at Hill Plaza to shed more light on the complaints.

The claimant replied by his letter of 07.08.2015. He stated as follows:

- As a director he did not directly supervise the enforcement officers. His role was to develop operational plans, resource them and then undertake monitoring and evaluation to guarantee effectiveness and realization of the desired impact. The work of supervision and operationalisation of the operational plans was vested in the Deputy Director, Enforcement and Accident Investigation, and, the Enforcement and Operations Manager, as well as, Field Supervisors. Further there had been no specific complaint or incident against his officers in the exercise of their respective duties. Measures had also been put in place to ensure integrity and professionalism in delivery by the officers including each enforcement officer had signed the operational guidelines; all operational briefs emphasise issue of integrity; corruption risk assessment matrix had been put in place and remedial measures instituted per order No.6; a proactive supervisory mechanism was in place to gather intelligence on perceived want of integrity and action taken such as transfers, warnings and realignment of the officers; the office of forensic investigator had been established pending

recruitment and appointment by the Board; he had maintained interaction with the public through social media and a hot line at the operations desk; and at least 10 cases of attempted bribery had been documented by the field officers as required.

- On the allegation of receiving or demanding monies from suspended Saccos, the claimant stated that the same was baseless in view of suspended operators on account of various reasons. The Transport and Safety Committee chaired by the Director General was in charge of decision making. He did not personally interact with suspended operators. He had also not demanded, received or been offered any monies or incentives of any nature from any operator.
- He confirmed his availability to clarify the issues.

The ad hoc committee met on 10.08.2015 as was scheduled. The ad hoc committee found that the allegations against the claimant as raised in the letter by the Principal Secretary were unfounded and the allegations were dismissed. However, the ad hoc committee in the process of its investigations came up with fresh allegations. By the letter dated 20.08.2015 the respondent conveyed to the claimant that at the Board meeting of 19.08.2015 it was resolved that further investigations be carried out against the claimant. The letter stated that the Board had directed that the claimant proceeds on a 30 days' compulsory leave effective 21.08.2015 during which time his terms of service would remain unchanged.

While on compulsory leave, the respondent addressed to the claimant the show-cause letter dated 02.09.2015. The allegations levelled against the claimant were as follows:

- a. Dishonesty and abuse of office contrary to section 10 (a) and (b), section 13(b) and (c) and section 29 of the Leadership and Integrity Act 2012. It was alleged that the claimant issued a list of companies purported to be approved by the respondent to several PSV operators to undertake customer care and defensive driving tests.
- b. Dishonesty, abuse of office, financial impropriety contrary to section 10(a) (b) and (c), section 12(1) and section 13(1) (a), (b) and (d). It was alleged that the claimant made false impost claims for activities that he did not participate in.
- c. Insubordination and absenteeism contrary to section 44(4) (a), (d), (e) of the Employment Act. It was alleged that the claimant on various occasions failed to respect the chain of command. Further he failed to attend meetings without cause. The list of such meetings was attached.
- d. Bullying and lack of professionalism contrary to section 34, 11(b), (d) of the Leadership and Integrity Act, and, Article 73(1) (ii) of the Constitution. It was alleged that the claimant harassed, intimidated and showed no respect for his officers and peers leading to disharmony which negatively impacted on work relations.

The letter required the claimant to respond in writing by 04.09.2015 by 10.00am. The claimant replied by his letter dated 07.09.2015 in the following terms:

- a. The show-cause letter reintroduced the matters the ad hoc committee had already dealt with and he had replied when he appeared before the committee on 19.08.2015.
- b. The issues had not been notified to him prior to meeting the ad hoc committee on 19.08.2015 and without such prior notice the committee had put the issues to him. Thus his rights had been violated as protected in Articles 25, 28 and 47(1) of the Constitution of Kenya, 2010.
- c. The show cause letter introduced serious issues without particulars some of which amounted to alleged criminal liability and in violation of Article 50 (2) of the Constitution.
- d. The show cause letter dated 02.09.2015 had been delivered to the claimant on 04.09.2015 at 10.30am after time to respond had lapsed being on 04.09.2015 at 10.00am. Thus contrary to Article 50(2) (c) he had not been accorded adequate time to prepare his defence.
- e. Contrary to Article 27 of the Constitution, he had not been the only officer mentioned in the letter of 20.08.2015 but he was the only one discriminated against and placed on compulsory leave contrary to principles of equality and freedom from discrimination.
- f. That he requested not to reply to the allegations substantively until the Board determined the preliminary or interlocutory objections as raised.
- g. Since details or particulars on the allegations had not been provided he requested for the details the list of PSV operators who had complained and evidence of furtherance of personal interest in that regard; the list of false impost, the activities and monies irregularly paid be provided; information and a list of specific occasions where he failed to respect the chain of command; and specific cases he had engaged in bullying and demonstrating the alleged repeated, offensive behaviour which was vindictive, cruel, malicious or inhumane and intended to undermine a person in accordance with the constitutional definition of the word.
- h. The claimant requested to be facilitated to effectively defend himself by being allowed access to the office, issuing official correspondence to staff of the respondent on issues that require their respective response and about the contents of his reply.
- i. The allegation raised were grave entailing alleged criminal liability and in such circumstances the burden to establish the same

rested with the respondent as the claimant found it difficult to respond without evidence in that regard.

j. The claimant maintained his innocence and awaited the reply about the matters he had raised.

The respondent addressed to the claimant the letter dated 11.09.2015 and which stated in part that to ensure that the claimant provided a comprehensive written response to the allegations and to protect his constitutional rights, the following were attached for his use:

- a. The list of trainers.
- b. The list of dates that the claimant claimed allowance for drunken driving activities.
- c. The letter illustrating failure to respect the chain of command.
- d. The list of meetings he had failed to attend without explanation.

The claimant was then given 7 days to reply to the allegations in the show-cause notice of 02.09.2017.

The claimant replied by his letter dated 15.09.2015 to the following effect:

- a. That his constitutional rights continued to be prejudiced by the disciplinary proceedings which he considered to lack merit.
- b. He had replied to the substantive allegations as per the letter by the Principal Secretary.
- c. The issues in the letter of 02.09.2015 were independent of the issues in the letter from the parent Ministry by the Principal Secretary.
- d. It was discriminatory to punish an innocent person.
- e. In the letter of 07.09.2015 the issue was not principally a request for more time but lack of particulars of the allegations on the 4 allegations in the respondent's letter of 02.09.2015.
- f. The claimant asked for further particulars and also made specific defence to the allegations. He also asked for further and specified certified copies of documentation relating the allegations.

By the letter dated 16.09.2015 the compulsory leave imposed by the letter dated 20.08.2015 was extended by two more weeks to 05.10.2015 to enable the Board to conclude the investigations. By the letter dated 22.09.2015 the respondent invited the claimant to a disciplinary hearing fixed for 24.09.2015 at 4.00pm before the Human Resource Committee of the respondent's Board. The letter stated that the claimant was required to present information on his whereabouts on the days in which he had been marked as absent on the attached list (and the claimant has filed the reply explaining the instances of absence from meetings with an explanation that time had run, some instances of absence were in situations not documented, and is possible memory lapses would lead to inability to full reply or account for all instances of absence). He was also granted supervised access to his office to adduce any documentation or evidence in support of his case. He was also entitled to attend the hearing accompanied by an employee of his choice as prescribed in the Employment Act, 2007.

By the letter dated 25.09.2015 the compulsory leave was extended to 19.10.2015. The disciplinary hearing took place and the report is filed. The Committee found that the claimant had been exculpated on the allegations of absenteeism and bullying as there was no sufficient evidence. The Committee found that the claimant was culpable on the allegation of dishonesty and abuse of office by issuing a list of companies purported to be approved by the respondent to several PSV operators to undertake customer care and defensive driving tests; allegation of dishonesty, abuse of office and financial impropriety by making false impost or allowance claims for activities that he had not participated in; and on allegation of use of abusive language.

The claimant's employment was terminated by the letter dated 22.01.2016 and effective 22.01.2016 on the following reasons:

- a. Improperly issuing a list of companies purported to be approved by the respondent to several PSV operators to undertake customer care and defensive driving tests.
- b. Making false claims for drunken driving activities that the claimant had not participated in.
- c. Evidence supporting insubordination.

The claimant was dismissed in accordance with clause 25 of his terms and conditions of service with entitlement to 3 months' salary in lieu of notice; gratuity on the term served; any leave accrued and not utilised; and less monies owed to the respondent. The said clause 25 stated, **"This contract may be terminated by either party giving a three months' prior notice, or on payment of an equivalent of three (3) months basic salary and house allowance only in lieu of such notice."**

The claimant appealed against the termination by his letter dated 25.01.2015. By the letter dated 29.01.2016 the respondent acknowledged receipt of the appeal. The letter required the claimant to handover and to vacate office. The claimant replied by his letter dated 01.02.2015 noting that his appeal included against the decision to hand over and to vacate office and it was prejudicial to do so prior to the determination

of the appeal. By the letter dated 08.02.2016 the claimant was informed that he had to hand over not later than 12.02.2016 and to stop representing the respondent or purporting to do so in any capacity. The claimant's hand over notes were delivered by email dated 12.02.2016 at 11.31am.

By the letter dated 01.02.2016 the claimant had through his advocates demanded the record of the proceedings and hearing resulting in the termination of his services; and the evidence leading to the termination. The respondent replied by the letter of 15.02.2016 asking for clarification if the pending appeal had to be disregarded and the disciplinary report and documentary evidence leading to the termination was attached.

By the letter dated 08.04.2016 the respondent conveyed to the claimant that the appeal per his letters of 25.01.2016 and 24.02.2016 had been considered at the Board meeting of 15.03.2016 and the decision to terminate the contract of service was upheld. The letter asked him to clear with the authority to facilitate the payment of terminal dues.

The claimant issued his letter of 11.04.2015 and 17.04.2016 addressed to the respondent's chairman and complaining about the termination and alleging several matters against the respondent's officers including the Director General one Francis Meja. He demanded immediate inquiry into the conduct of Francis Meja, to investigate all the cases he had highlighted; the case of one Cosmas Ngeso be referred to the EACC for a competent investigation; and he be reinstated as the Director Road Safety.

The 1st issue for determination is whether the reasons for terminating the claimant's contract of service were valid as at the time of termination and as envisaged in section 43 of the Employment Act, 2007. The Court makes findings as follows:

a. The first reason for termination was improperly issuing a list of companies purported to be approved by the respondent to several PSV operators to undertake customer care and defensive driving tests. The claimant's evidence as per the report on the disciplinary hearing was that he was aware of the list but denied that he had issued it as an approved list of trainers. His position was that the four firms had expressed desire to provide training and noted that the four firms' curriculum had been approved by National Industrial Training Authority (NITA). He confirmed that the list was a repository list and he could confirm the competency of the firms. It was the respondent's position that the claimant had told the ad hoc committee at the meeting of 12.08.2015 that he was aware of the list and he had approved its use at a directorate level and the report shows that the claimant nevertheless denied approving the list. The Human Resource Committee then concluded that there was compelling evidence to indicate that the claimant did indeed state to operators that there was an approved NTSA list of trainers and that the operators had to use one of the listed firms. The Court has considered the report of the disciplinary hearing and the material on record. The respondent has failed to show the purported evidence that the claimant had informed the PSV operators to use the list. The Court has not been shown oral or written evidence to show that the list was generated by the claimant and then communicated or published and publicised by the claimant to the operators as the respondent's approved list of trainers. The claimant confirms that in his directorate the list had been brought to his attention and he could indeed confirm the trainers as competent. The Court returns that there was nothing wrong with the claimant retaining in his directorate the list of the firms as a repository of competent trainers. Indeed, the Court finds that it was within the claimant's duties and responsibilities to maintain such repository within the responsibility and duty to provide strategic leadership to the respondent's road safety department; to coordinate agencies involved in road safety programs and initiatives; to undertake road safety research and audit; and to initiate and coordinate road safety awareness programs. The Court therefore returns that the initiative to retain the list as a repository was well within the claimant's terms of reference. Further there was no evidence that the claimant issued the list of firms to the operators recommending them as competent trainers but the Court returns that even if the claimant had done so, the same would have been properly within the stated responsibilities and duties as vested in the claimant in the letter of appointment dated 24.04.2014. The same will therefore collapse as it was not an established valid reason for termination as at the time of termination.

b. The next ground for termination was making false claims for drunken driving activities that the claimant had not participated in. The report on the disciplinary case shows that the list of drink driving activities was unsupported by an attendance list; the work tickets for the claimant's official car showed he had not attended the activities, and the internal audit report supported the allegation. The report on the disciplinary case states that the documents were attached. However the same were not attached to the exhibited copy of the report. The Court has not therefore been shown the evidence supporting the claims as alleged in the disciplinary report. The Court has carefully considered the allegation. There is no stated amount of money that is alleged to have been paid to the claimant as a result of the alleged irregular and unjustified payment to the claimant. The evidence is that the claimant was paid the full amount of the terminal dues as was set out in the letter of termination and amounting to Kshs.3, 731, 785.95 as more particularly computed at paragraph 44 of the respondent's submissions. There is no mention of a surcharge or deduction to pay the liability owed to the respondent in view of the alleged irregular or unjustified pay. Indeed the respondent did not make a counterclaim in that regard. Accordingly the Court returns that the on a balance of probability the respondent has failed to establish that reason of termination as was alleged for the respondent. The same will collapse as it was not a valid reason for termination as at the time of the termination.

c. The final ground of the termination was evidence supporting insubordination. The disciplinary report states thus, "**On insubordination, the HR Committee failed to find conclusive evidence of this in the hiring of foot bridges. However the HR Committee found the DRS's responses to the DG's letters to be inappropriate and contrary to section 44(4) (d)**" Section 44(4) (d) of the Employment Act, 2007 provides that it amounts to gross misconduct for an employee to use abusive or insulting language or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer. The Court has perused the report on the disciplinary hearing and finds that while forming the opinion and then finding that section 44(4) (d) of the Act applied, the HR Committee did not state the abusive or insulting language or behaviour that was insulting in that regard. The Court follows the holding by the Court of Appeal in CMC Aviation Limited –Versus- Mohammed Noor [2015]eKLR, (Karanja, Musingu & Gatembu JJ.A) that the employer must specify the alleged abusive or insulting words that the employee uttered in discharging the burden of justifying the grounds of the termination of employment or wrongful dismissal as per section 47(5) of the Employment Act, 2007. Further it was clear that that purported ground of termination was introduced at the disciplinary hearing or report and then in the termination letter without prior notice to the claimant in that regard so that it was without adherence to the due process of a notice as envisaged in section 41 of the Act. In National Cereals and Produce Board –Versus- John Kirui Tongorei [2017]eKLR, the Court of Appeal (G.B.M. Kariuki, Sichale, and Kantai, JJ.A) it was held, "**....When the respondent was**

summoned to an administrative employment meeting, allegations were made notice of which had not been served upon the respondent. This was wrong. The appellant should have adhered to fair administrative action by notifying the respondent in advance of new allegations and giving him ample opportunity as required by law to prepare and present a response or defence to the allegations and to be represented by a representative to the said meeting if he so wished. This the appellant failed to do and in the process the respondent was denied a fair hearing. By terminating the respondent's services for reasons that were different from the reasons given in the suspension letter, the appellant breached the respondent's rights and the learned Judge was right to find that termination of the respondent's employment was unfair. We agree with that finding and can find no error in the way the trial Judge dealt with the same."

The Court returns that as at the time of termination, the respondent has failed to show that there existed genuine or valid reasons for terminating the claimant's contract of service as envisaged in sections 43 and 47(5) of the Employment, Act, 2007. The termination was unfair for want of genuine reasons as at the time of termination.

The 2nd issue for determination is whether the claimant was accorded due process during the disciplinary proceedings. It is submitted for the respondent that the claimant was notified the allegations as were levelled and he was accorded a disciplinary hearing as per section 41 of the Act. For the respondent it is submitted that the report of the ad hoc committee on the allegations in the letter dated 05.08.2015 was adopted by the respondent's Board on 19.08.2015 prior to the show cause notice of 22.09.2015 being issued to the claimant so that the same was in contravention of section 41 of the Employment Act, 2007 on notice and hearing. The Court returns that the report of the ad hoc committee was in the nature of a preliminary inquiry but its adoption at the Board meeting was procedurally irregular to the extent that the Board as a final decision maker on the disciplinary case ought to have retained an arms-length position from that of the investigative function. The Court returns that by adopting the preliminary report by the ad hoc committee, the Board thereby predetermined the disciplinary case that the claimant was facing and that was procedurally unfair. It is the Court's opinion that an authority or person vested with the function or power to make a final decision on merits of a case must keep an arms-length position with respect to investigations for or against the case so as to sustain objectivity and independence towards impartial and appearance of impartiality when the decision on merits of the case comes to be made. The Court follows the holding against predetermined decisions in Paul Nyadewo Onyangoh –Versus- Parliamentary Service Commission and Another [2018]eKLR thus, "Fourth, it was clear that under Regulation 36, it was the deputed officer, in this case the 2nd respondent as defined in Regulation 2 that was to initiate the process for removal of the claimant in the interest of the service and the 1st respondent to make the decision at the end of the investigative process. In the instant case it is clear that the 1st respondent purported to initiate the process and then at the same time to exercise discretion and terminate the claimant purportedly in the interest of the service whereas, the decision was already predetermined at the 228th meeting of 10.05.2016 at which the 1st respondent had already formed the opinion that the claimant should be retired in the interest of the service. The Court finds that while the 2nd respondent failed to exercise the discretion and authority to initiate the process of retirement as per Regulation 36, without authority or jurisdiction the 2nd respondent purported to initiate the process and therefore having taken a predetermined decision by such initiation, purported to "fairly and objectively" conclude the process by retiring the claimant in the interest of the service. That Court returns that it was unfair."

The Court has already found that some of the reasons for the termination had not been mentioned in the show-cause notice and to that extent, the Court returns that section 41 on a notice and then disciplinary hearing in that regard was not adhered to.

It was submitted for the claimant, and correctly so, that the show-cause notice and all the disciplinary proceedings and subsequent termination were founded upon misdirection that the claimant was a state officer as defined in Article 260 of the Constitution and the further misdirection that the cited sections of the Leadership and Integrity Act, 2012 applied. The Court returns that it was, as submitted for the claimant, oppressive and unfair to impose upon the claimant a status of a state officer but which he did not hold and then prefer allegations against him accordingly.

For the stated findings, the Court returns that the termination was procedurally unfair as it cannot be said to have been a fair procedure as envisaged in section 45 (2) (c) of the Employment Act, 2007.

It was submitted that the claimant had not been informed about the right of appeal. The Court considers that the concern was secondary because the claimant had not pleaded and submitted that appeal and then notification of such right of appeal was an agreed contractual term. The appeal proceedings being supplementary introduced by the conduct of the parties condoning the same and long after the termination, the Court returns that the submission would not significantly count towards a finding that the process was thereby unfair.

To answer the 3rd issue for determination, the Court returns that in view of the findings on the 1st and 2nd issues for determination, the termination of the claimant's employment has been established to have been unfair in substance or merits as well as in procedure under sections 43, 45, and 47 of the Employment Act, 2007.

The 4th issue for determination is whether the claimant is entitled to the other remedies as prayed for. The Court makes findings as follows:

First, the Claimant prays for reinstatement to the position of Director Road Safety. There is no dispute that the 3 years' contract of service would end by effluxion of time around June 2017. The termination was effective 22.01.2016. It is submitted that under clause 6 of the contract of service the claimant had a legitimate expectation for renewal of appointment. The clause states, "Should you wish to be reappointed in the same position, you will be required to make a written request at least six (6) months before the expiry date of this contract. Should the Board decide not to renew your contract for any reason then a three months notice on the intention not to renew will issue." It is submitted that the Court should follow the holding in Teresa Carlo Omondi –Versus- Transparency International Kenya [2017]eKLR, where Rika J held that a legitimate expectation for renewal and which is not honoured may in some instances constitute a basis to show that the termination was unfair. In that case, Rika J stated, "91. The burden of proof, in legitimate expectation claims, is always on the Employee. It must be shown that the Employer, through regular practice, or through an express promise, leads the Employee to legitimately expect there would be renewal. The expectation becomes legally protected, and ought not to be ignored by the Employer, when managerial prerogative on the subject is exercised. Legitimate expectation is not the same thing as anticipation, desire or hope. It is a principle based on a right, grounded on the larger principles of reasonableness and fair dealing between

Employers and Employees. The Employee must demonstrate some rational and objective reason, for her expectation. The representation underlying the expectation must be clear and unambiguous. The expectation must be induced by the decision maker. The decision maker must have the authority to renew. Repeated renewals, extended service beyond the period provided for in the fixed term contract, and promise of renewal, are some of the elements that would amount to objective reasons underlying expectation of renewal. The presence of these elements however, is not taken as conclusive proof of legitimate expectation.” The court has followed that opinion and been guided accordingly.

In the instant case, the contract provided for renewal with clear conditions to be satisfied. The time for the prescribed conditions had not come. It is unknown whether the claimant would have desired to renew and whether the respondent would have failed to renew within the terms of service. The Court returns that the exercise of renewal clause had not accrued so that in event of an order for reinstatement, it would only be up to the time of the unexpired tenure of the contract being 16 months because, in the instant case and in the words of Rika J, legitimate expectation appears to be urged merely “.... **as anticipation, desire or hope**”.

The Court has considered that the claimant had otherwise served with a clean record and he had been removed in a manner that was under what the Court has found to have largely been a predetermined decision to be terminated. The Court has considered that the allegations as earlier levelled in the letter by the parent Ministry had been found not valid and the respondent appears to have gone fishing around to find a justification to terminate the contract of service. The Court finds that such conduct violated Article 236 of the Constitution that protected public officers like the claimant from victimisation and removal from office except in accordance with due process. The Court returns that such is a compelling circumstance under section 49 of the Act that the respondent appears to have had a predetermined decision to terminate the claimant’s service and reinstatement would therefore be justified.

It is the evidence that on several occasions the claimant asked for better particulars and relevant evidence to support the allegations and to enable him to prepare his defence. Despite that correspondence, the Court has found that the claimant was subsequently unfairly terminated both in substance and in procedure.

The Court returns that the claimant would be entitled to reinstatement for the unexpired term of service, even as a partial reinstatement in that regard.

While making that finding the court uphold its opinion in Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers –Versus- Timber Treatment International Limited,[2013]eKLR, Industrial Cause No. 21 of 2012 at Nakuru, page 10-11, where the court stated thus “**In making the findings the court considers that the employee is entitled to pay for the period he or she is kept away from work due to unlawful and unfair suspension or termination. In such cases, the employee is entitled to at least partial reinstatement, and therefore compensation whose measure is the proportionate unpaid or withheld salary throughout that period of unlawful or unfair suspension or termination. During such period, the court considers that the employee carries a valid legitimate expectation to return to work and not to work elsewhere until the disciplinary or the ensuing conciliatory and legal proceedings are concluded. In arriving at the finding of entitlement to reinstatement during unlawful or unfair suspension and termination, the court has taken into account the provisions of subsection 49(4) (f) which states that in arriving at the proper remedy, there shall be consideration of, ‘(f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for termination;’.** The court is of the opinion that for the period the question of unfairness or fairness of the suspension or termination has not been determined, the employee carries a reasonable expectation that for the period pending the determination of that question, the employment has not validly terminated and the employee is entitled to reinstatement during that period provided the employee is exculpated; with pendency of such serious question, the employee is validly expected to pursue the resolution with loyalty not to work for another employer. It is the further opinion of the court that where the court finds that the suspension or termination was unlawful or unfair, the employee is entitled to at least partial reinstatement, and therefore, a total of the salaries due during that period. The exception (to such entitlement to partial reinstatement for the period pending a final decision on the dispute) is where it is established that during that period, the employee took on other gainful employment or the employee fails to exculpate oneself as charged.”

Consequential to the reinstatement, the claimant is awarded 16 months salaries for the unexpired term of service of 16 months at Kshs. 460, 580.00 per month making **Kshs.7, 369, 280 .00**.

Second, the Court considers that the other financial claims for compensation were made in alternative to reinstatement and which has been awarded. Further, the Court has considered the award and pay consequential to reinstatement and returns that the claimant has substantially been put in a position as though he was not terminated and the interests of justice have thereby been substantially and adequately served. Further the Court has considered the payments already made to the claimant under the terms of the termination letter and the same are sufficient mitigation in favour of the respondent that no further compensation should be made under section 49 of the Act for the unfair termination.

Third, the Court returns that the procedural unfairness has been considered by the Court within the finding of unfair termination and award of reinstatement so that justice has been sufficiently served in the instant case. Thus the Court returns that general damages for alleged violation of the right to fair administrative action under Article 47, and the violation of the right to fair labour practices under Article 41 of the Constitution will not attract further award of damages in the circumstances of the instant case.

The **5th issue** for determination is whether the respondent is entitled to the prayers in the counterclaim. The Court has made findings on the issue of fairness of the termination and the residual remedies in the counterclaim are two, thus:

- a. A permanent injunction be issued restraining the claimant by himself, his agents, servants, employees or otherwise howsoever from harassing the respondent’s employees, disclosing the respondent’s confidential information, causing to be published or publishing disparaging materials about the respondent, disparaging the respondent’s reputation by making false claims against the respondent on internet, newspapers, Facebook, Twitter, YouTube, WhatsApp, or any other medium whatsoever or in any manner whatsoever pursuing any conduct designed to undermine the respondent’s statutory mandate.

b. An order of the Honourable Court do issue to the claimant to forthwith remove from Facebook, Twitter, YouTube, WhatsApp, or any other medium whatsoever or in any manner whatsoever pursuing any conduct designed to undermine the respondent's statutory mandate.

The evidence is that the claimant published an on-line series known as “#Corruption Den”. There was no dispute that the content was hostile to the respondent's public image and related to information obtained by the claimant during his service with the respondent. It is submitted for the claimant that he published the series on the basis of the public's right to know, it was in self defence in view of the respondent's unfairness against him, and the publication was truthful as it was information already in public domain. It was submitted for the claimant that public institutions like the respondent cannot maintain an action in defamation as was preferred and as was held in Nairobi City County Government –Versus- John Kamau and Another [2017]eKLR where Derby Shire County Council- Versus- Times Newspaper Limited (1993) 1 All ER 1011 was cited for the holding that a government must be open to criticism. It was also submitted that in PTC –Versus- Modus Publications (PVT) Limited (1997) (2) ZLR 492 it was held that a state should not maintain any claim in defamation. The claimant further cited Francis Cherono Ngeny and 11 Others –Versus- Sammy Kiprop Kilach [2017]eKLR which cited Chirau Ali Mwakere –Versus- Nation Media Group Limited and Another [2009]eKLR where Khamoni J defined a privileged occasion as, “ **An occasion where the person who makes a communication has interest or a duty, legal, social or moral to make it to the person to whom it was made and the person to whom it was made had a corresponding interest to receive it.**” The claimant also cited, Halsbury's Laws of England 4th Edition Re-issue Volume 28 at paragraph 109 that one of the categories of qualified privilege is “**communication to the public at large or to a section of the public pursuant to a legal, social or moral duty in replying to a public attack.**”

It was the claimant's case and he has exhibited attacks or queries from members of the public, including the respondents' employees, so that he was constrained to publicly reply in the manner he did. It was also the evidence that even after the compulsory leave and then termination the respondent retained the claimant's profile on its website with the consequence that he continued to receive complaints on social media as though he was still the respondent's employee. The attacks having been persistent, it is submitted, his replies on #CorruptionDen were therefore on a qualified privilege as a social and moral duty to reply and convey to the public that he was not in charge and to reply accordingly.

The respondent urges that from 29.11.2016 and after the termination the claimant resorted to making defamatory, false and malicious allegations and claims against the respondent and its officers calculated to tarnish the respondent's reputation and that of its officers. The respondent urges that the claimant acted by publications on social media to show that he was a saint and the other employees of the respondent and the respondent were villains and zombies who did not know what they were doing and did not know the statutory mandate of the respondent.

The evidence is that there is no doubt that the claimant published disheartening information on social media and on #CorruptionDen as exhibited by the respondent. However, the Court finds that as urged for the claimant, a public body cannot, at common law, sustain a claim or action in defamation. Further, it was the evidence that the respondent retained the claimant's profile on its website and in view of the public communication and concerns on social media, the Court finds that the claimant has established a valid moral and social duty that then evolved to reply to show he was no longer in charge and the duty, in the findings of the Court, amounted to a valid defence of a publication on privileged occasion as urged for the claimant.

In any event, the Court has returned that there could be no sustainable action in defamation against the respondent which is a public body or government agency and further, the individual employees as may have allegedly been defamed were not party to the present suit. The Court further considers that for any future offensive publication by the claimant which may be unlawful, as the case may become to be alleged, the respondent would be able to find a new cause of action and appropriate remedy in law, as the case may be or appropriately so. Further the interlocutory orders dealt with the past publication effectively and in the opinion of the Court, sufficiently or conclusively so towards just and fair hearing of the suit and the matter should be allowed to rest accordingly.

The Court has carefully considered the constitutional protection on the freedom of the media under Article 34; Article 35 the right of access to information; Article 32 on freedom of conscience, religion, belief and opinion; and Article 33 on freedom of expression. The Court finds that in the circumstances of the case, the respondent has not established a constitutional basis or a statutory qualification or limitation of the rights as envisaged in Article 24 of the Constitution that would justify the denial of the claimant's rights in that regard and by way of the grant of the orders as prayed for in the counterclaim. The Court further considers that the parties should have been able to pursue their rights in that regard founded upon the contract of service and applicable public service laws and regulations that governed the claimant's service and until clear contravention of such law and contractual provisions was established, but which was not done, the Court would not interfere with the claimant's rights as envisaged in the cited constitutional provisions.

While making that finding the Court returns that the higher calling is to protect the claimant's cited constitutional rights which are crucial in an open, civilised and democratic society and necessary towards implementation of the values and principles of governance in Article 10; the values and principles of public service in Article 232; chapter 6 on Leadership and Integrity; and Article 236 of the Constitution on protection of public officers. The Court holds that the jurisdiction to bar a serving or former public or state officer from publishing information would very sparingly be exercised and only where it is strictly established to be within the confines of a clearly established breach or violation of applicable public service terms and conditions of service, public service code of conduct, the applicable law and regulations. The present counterclaim was not premised on such allegations of breach or violation at all and the Court returns that the same was not justifiable within the tenets of a good public service delivery.

Accordingly, the Court returns that the Counterclaim will fail.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- 1) The declaration that the respondent's action to terminate the claimant's employment was unfair within the meaning of section 45 of the Employment Act and therefore the termination was grossly unfair.

- 2) The declaration that the respondent's actions have infringed on the claimant's legitimate expectation that as a public authority the respondent would uphold the principles of fairness, equality, good governance and natural justice and constitutionalism.
- 3) The respondent to pay the claimant a sum of **Kshs.7, 369, 280 .00** by 01.03.2019 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
- 4) The dismissal of the counterclaim with costs.
- 5) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 4th January, 2019.

BYRAM ONGAYA

JUDGE