



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 27 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER: OF ARTICLE 3, 19, 20, 22, 23, 35, 40, 41, 47, 50, 159, 162(2), 165(3)(b), 175(a), 184,185,258 AND 260 OF THE CONSTITUTION

AND

IN THE MATTER OF: AN ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLE 20, 28, 35, 41, 47, 48, 50, 73, 201 AND 232 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: ENFORCEMENT OF THE CONSTITUTION OF KENYA, 2010,

AND

IN THE MATTER OF: SECTION 10, 12, 13 of THE EMPLOYMENT ACT, 2007,

AND

IN THE MATTER OF: SECTION 59, 63, 69, 70, 72, 74 AND 76 OF THE COUNTY GOVERNMENT ACT OF 2012

AND

IN THE MATTER OF: SECTION 5, 6, 7, 8 AND 10 OF PUBLIC SERVICE (VALUES AND PRINCIPALS) ACT NO 14 OF 2015

AND

IN THE MATTER OF: SECTION 9, 10, 11 AND 12 OF PUBLIC OFFICER ETHICS ACT CAP 193 OF 2003,

AND

IN THE MATTER OF: SECTION 8,9,10 AND 15 OF LEADERSHIP AND INTEGRITY ACT CAP 182 OF 2012,

AND

IN THE MATTER OF: SECTION 4, 6, 7, 8, 9 AND 11 OF THE FAIR ADMINISTRATIVE ACTION ACT NO 4 OF 2015

BETWEEN

FRANCIS ANGUEYAH OMINDE.....PETITIONER

VERSUS

DR. CLEOPHAS KIPROP LAGAT (GOVERNOR, NANDI COUNTY).....1ST RESPONDENT

JUDGMENT

The Petitioner was at the time material to this suit the holder of the office of County Secretary of Nandi County having been appointed by the Governor of the County Government subject to the approval by the Nandi County Assembly. The 1st Respondent was at the material time the Governor of Nandi County Government and holder of the office pursuant to Article 180 of the Constitution of Kenya, 2010. The 2nd Respondent is a state organ created under Article 176 of the Constitution of Kenya as read with the County Government Act.

The Petition filed in Court on 13th July 2017, seeks the following orders:

- a) An order of stay/suspension and/or implementation of the letter dated 11 July 2017 by the 1st Respondent purporting to terminate/dismiss the petitioner from his employment as the County Secretary of Nandi County Government.
- b) Declaration that the actions of the Respondents contravened and infringed on the Petitioner rights pursuant to Articles 19,20, 23,35, 40, 47, 50, 159, 185, 201 and 258 of the Constitution.
- c) An order declaring that the petitioner remains the county secretary of Nandi County Government unless and until lawfully removed as prescribed by the Constitution, the County Government Act and written law.
- d) A declaration that the actions of the Respondents in view of the summary dismissal complained of relating to violation of rights and contravention of law, as against the petitioner, have contravened the Constitution of Kenya and written laws.
- e) A declaration that any person appointed to act in place of the petitioner is holding the office illegally and the same is null and void.
- f) An order of compensation against the acts of violation of rights complained of in this petition.

The Petitioner avers that he brings this petition in defence of the Constitution of Kenya and alleges that the same has been contravened and that pursuant to Article 258(1) of the Constitution of Kenya, he is seized of the right to commence court proceedings. He further states that the provisions of the chapter on the Bill of Rights on fundamental rights and freedoms and respect to the rule of law as a constitutional obligation to state officers and state organs, has not been observed by the state officer, in this case the Governor, Nandi County Government and the County Government of Nandi.

Petitioner’s Case

The facts giving rise to the Petition are that the 1st Respondent, on 11th July 2017 purporting to act pursuant to section 44 of the County Government Act illegally and unlawfully terminated the employment of the Petitioner as the County Secretary of Nandi County. The petitioner avers that the termination letter issued to him by the County Government of Nandi was to take immediate effect on grounds of unknown gross misconduct.

That according to the Discipline Manual for the Public Service (May 2016), offences under gross misconduct that lead to summary dismissal are, negligence of duty, intoxication during working hours, using abusive language or insulting language or behaviour in a manner likely to cause a breach of peace, insubordination, criminal conviction, incarceration for more than 14 days following arrest for cognizable offence, wilful destruction of government property, theft by public servant, unauthorized use or disclosure of confidential information, falsification, of information or references on appointment and acceptance of any bribe, secret profit or unauthorized commission.

The petitioner alleges that he has never been engaged in any form of gross misconduct aforesaid as alleged by the 1st Respondent to warrant his summary dismissal which contravened Article 47 of the Constitution. Further that the Petitioner has to date never been informed of the reasons for summary dismissal and/or removal from office as the County Secretary of Nandi County. That within 24 hours of his removal the 1st Respondent claimed to have engaged another person in the petitioner’s position on acting basis without giving the Petitioner a chance to defend himself, hand over and/or have sufficient notice thereof to vacate the office.

It is the Petitioner’s case that the actions of the Respondents are not only illegal, unlawful but also violate the petitioner’s rights to fair administrative action as enshrined in Article 47 of the Constitution and the Principle of legitimate expectation and punitive. That the actions complained of constitute flagrant impunity and abuse of office by the Respondents and that they are hell bent at occasioning a Constitutional crisis during this transition period.

The Petitioner contends that since 11th July 2017, he has been denied access to the County government of Nandi precincts and all his privileges and earnings withdrawn by the Respondents. Further that the Respondents violated the Petitioner’s fundamental rights in contravention of the Constitution, County Government Act, and written law by denying the Petitioner the right to attend meetings three days prior to his summary dismissal.

The Petitioner also states that he is aggrieved by the Respondents’ actions of serving the petitioner with a letter of summary dismissal and circulating the same through social media via face book, whatsapp and skype in violation of his rights as enshrined under Article 29 of the Constitution.

It is the petitioner's case that it was incumbent upon the 1st Respondent to comply with due process and full compliance with the mandatory provisions of the law including right to be notified of charges well in advance, and affording him right of hearing and a reasonable opportunity to respond to allegations or grounds advanced and/or proposed for removal, before removal from office in his capacity as a state/public officer.

He contends that the court has jurisdiction under Articles 3, 19, 20, 23, 35, 40, 41, 47, 150, 159, 162(2), 165(3)(b), 175(a), 185, 258 and 260 of the Constitution, to grant appropriate relief, including a declaration of right and an order reversing his illegal and unprocedural dismissal. That the Respondents contravened Article 25, 47, 50(1)(2) of the Constitution of Kenya and this in effect amounted to unfair administrative action being taken against him and a contravention of his fundamental rights. Further that his right to fair labour practices pursuant to sections 10, 12 and 13 of the Employment Act have been contravened and therefore urges the Honourable court to intervene and declare his dismissal unconstitutional.

The Petitioner also filed an affidavit in support of the Petition wherein he reiterates the facts as contained in the petition and adds that as a result of the Respondents' actions he was depicted and portrayed as corrupt, lacking in integrity, and as having abused the functions of his office, having abdicated his statutory roles and duties based on unknown and baseless charges.

Respondents' Case

The Respondents oppose the Petition and filed a joint response wherein they state that the Petition is not properly before the Court as this Court has its own rules of practice, and that the proper pleading to lay a claim ought to have been a Statement of Claim supported by a Verifying affidavit.

That the 1st Respondent found that the Petitioner was culpable of high level of dishonesty, lack of integrity, accountability and fell short of the basic tenets enshrined under Chapter six of the Constitution. He was also accused of mishandling workers and insubordination.

The Respondents contend that the Petitioner is part of a wider scheme among three (3) other officials who were also sacked, the Petitioner in particular is accused of five acts of gross misconduct by a public officer namely: -

- a. Removing names of public servants from pay roll.
- b. Refusing to take lawful instructions from the appointing authority;
- c. Written numerous letters and memos to various departments and agencies of the county government purporting to issue directions not issued by county executive committee;
- d. Wilfully and deliberately refused to implement the decisions and directives of the County Executive Committee;
- e. Purported to initiate the process of removing members of the County Public Service Board.

That the above allegations were supported by evidence, corroborated by witnesses and affidavit evidence to demonstrate the extent of the Petitioner's gross incompetence and misconduct. That there were several verbal complaints from other junior county staff against the said Petitioner which were becoming unbearable and the 1st Respondent as the appointing authority acted in good faith by taking certain action.

The Respondents contend that the Petitioner acted in contravention of his roles under Section 44 of the County Governments Act, 2012 and as such the actions of the 1st Respondent were well founded and it was because of the lack of confidence and trust shown in the Petitioner's conduct, leading to his termination which he himself participated unknowingly despite being a public officer on secondment.

That following the Petitioner's irregular actions, the employer lost confidence and trust in him thus ending the contractual relationship prompting the employer to appoint another person to act in the said position.

It is the Respondents' position that the Petitioner was not apologetic to the 1st Respondent for his acts or omissions but opted to move to court and pursue a fiat against the employer, contravening The Public Officers Ethics Act, County Governments Act, and code of conduct by officers.

That the Petitioner is estopped by law and by statute to cite the Acting Secretary since he opted not to enjoin him in the proceedings and has not disclosed the reasons why he failed to enjoin him. Furthermore that the Petitioner is also part of the Staff of the 2nd Respondent who were laid off for allegations of misappropriation of funds and chronic embezzlement which almost brought the 2nd Respondent to a standstill and a subject of scrutiny by EACC and DCI.

The Respondents also contend that the financial audit report for the financial year 2016/2017 contains evidence of gross misconduct and incompetence on the part of the Petitioner whose actions or omissions if true, should lead to his prosecution. They pray for the Court to hold that the Petitioner was validly removed from employment as he contributed to his own termination from employment.

They further pray that the court direct that the actions and omissions by the Petitioner be considered and a thorough audit and investigations as regards his conduct be implemented and the Petitioner be held liable.

Petitioner's Submissions

It is submitted on behalf of the Petitioner that Article 165(3)(b) of the Constitution of Kenya empowers the Employment and Labour Relations Court to determine whether a right or a fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

Counsel submits that the acts of the Respondents of circulating the termination letter of the Petitioner on social media sites amounts to degrading treatment and subjected the Petitioner to emotional and psychological stress, as evidenced through the tarnishing of his name by claiming gross misconduct on his part the Respondents who have failed to substantiate the claims with any evidence.

That through the issuance of the termination letter by the 1st Respondent, the Respondents failed to issue adequate notice of the nature and reasons for the proposed administrative action, an opportunity to be heard and for the Petitioner to defend himself of the alleged acts stated in the termination letter, and access to the information, materials and evidence relied upon by the Respondents in the making of the decision and/or taking the administrative action. That as a result, the act of issuance of the letter dated 11th July 2017 by the 1st Respondent purporting to terminate the employment of the petitioner as the County Secretary of Nandi County Government should be declared null and void.

It is submitted that the Respondents' actions limited the Petitioner's constitutionally enshrined rights including the right to access of information as enshrined in Article 35 and the right to fair administrative action as contemplated in Article 47 of the Constitution which translates into an opportunity to be informed of an impending administrative action to be taken against a person, an opportunity to have access to the materials, evidence or information that resulted in undertaking of the administrative action, and an opportunity to be heard and defend oneself of the alleged acts levelled against an individual.

Counsel for the Petitioner prays that this honourable court exercise its powers as enshrined in the Constitution and other written laws in granting the prayers sought by the Petitioner in the Petition.

Counsel cites the case of ***Friends of Lake Turkana Trust v Attorney General & 2 Others [2014] eKLR***, P. Nyamweya J. stated as follows;

“Every citizen has the right of access to information held by the state, information held by another person and required for the exercise of the protection of any right and fundamental freedom.”

They also cite Mumbi Ngugi J. in ***Nairobi Law Monthly Company Limited V Kenya Electricity generating Company & 2 Others (2013) eKLR*** where she held that:

“What is required is for the person seeking information to make a request for such information. A violation of the right to information cannot be alleged before a request for information has been made.”

The same court made observations that:

“Even though the right to information implies entitlements to the citizen to information, it also imposes a duty on the State with regard to provisions of information. Thus the State has a duty not only to proactively publish information in the public interest - this, I believe, is the import of Article 35(3) of the Constitution of Kenya which imposes an obligation on the State to ‘publish and publicize any important information affecting the nation’ but also to provide open access to such specific information as people may require from the State.”

That the Petitioner was not given access to any information pertaining to the gross misconduct alleged in the termination letter, the alleged acts levelled against the Petitioner were unfounded and uncorroborated as there was no iota of evidence.

Counsel for the Petitioner also relies on the case of ***Narok County Government & Another v Richard Bwogo Birir & Another [2015] eKLR*** held that fair labour practices encapsulate the right to be given prior notice of any impending adverse decision against a person, an opportunity to have access to the information that supported the administrative action.

It is also submitted that the Petitioner remains the County Secretary of Nandi County until he is validly removed. Counsel submits that by virtue of Article 2(1) of the Constitution of Kenya, 2010, Article 3(1) of the Kenyan Constitution, the Respondents among other persons have the obligation to respect, uphold and defend the Constitution. That any act that contravenes, threatens, violates, and infringes upon any constitutional provision is invalid as enshrined in Article 2(4) of the Constitution. The unlawful acts of the Respondents vitiate any adverse action taken against the Petitioner and therefore that he is still in office.

It is also submitted that the Respondents have not established the acts of gross misconduct forming the basis of the termination and the Court should find that none existed.

That Section 44 of the County Governments Act, 2012 spells out the functions of the County Secretary and the supporting affidavit annexed to the Petition dated 13th July 2017 has annexure which clearly demonstrate that the memos sent out by the County Secretary were to ensure the effective management of the County's operations and resources through exercising due diligence and not as alleged by the Respondents in their termination letter. That the actions of the Respondents therefore amount to unfair termination as contemplated under section 45 of the Employment Act.

Further that the right to a fair hearing also entails duty to act fairly. The right to a fair hearing encompasses “*due process*” for the sole purpose of observing the rule of law. Counsel cited the Court of Appeal case of ***County Assembly of Kisumu & 2 Others v Kisumu County Assembly Service Board & 6 Others [2015] eKLR***, the learned Judges, D. K. Maraga, D. K. Musinga and A. K.

Murgor held as follows;

“The primary meaning of the rule of law as anybody who has anything to do with the law knows, “is that everything must be done according to law.”

In relation to governmental power, this means that every government authority must justify its action, which deprives an individual of his right or infringes his liberty, as authorized by law. This “is the principle of legality.-’ But the rule of law demands more than just the principle of legality. It demands, and this is the second meaning of the rule of law, “that government should be conducted within a framework of recognized rules and principles which restrict discretionary power.

Due process is a fundamental aspect of the rule of law. Due process is the right to a fair hearing. The right to a fair hearing encapsulated in the audi alteram partem rule (no person should be condemned unheard) and founded on the well-established principles of natural justice, is not a privilege to be graciously accorded by courts or any quasi-judicial body to parties before them. As is clear from Articles 47 and 50 of our Constitution, it is a constitutional imperative.

Whereas the right to a fair hearing varies from one case to another depending on the subject of the matter in issue, its irreducible minimum is now well settled. In granting that right, the court or the administrative body or person concerned should not make it a charade by taking perfunctory actions for the sake of running through (lie motions to be seen to have complied with it. The person charged is entitled to what, in legal parlance is referred to as the right to “notice and hearing.” That means he must be given written notice which must contain substantial information with sufficient details to enable him ascertain the nature of the allegations against him. The notice must also allow sufficient time to interrogate the allegations and seek legal counsel where necessary. In the epigram of the indomitable Lord Denning in Kanda v. Government of Malaya “If the right to be heard is to be a real right which is worthy anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.” What amounts to sufficient notice also varies from case to case. But as stated, the notice must contain substantial information with sufficient details to enable the person charged to ascertain the nature of the allegations made against him. The notice must also comply with any statutory requirements where the same are provided.”

That having established that the termination was unlawful counsel submits that any person appointed by the 1st Respondent to act in the position of county secretary is doing so illegally. Counsel also prays for the petitioner to be awarded compensation for the breach of his fundamental rights and having suffered loss as a result in terms of salary and allowances. In light of the foregoing submissions counsel urged the court to allow the Petition with costs.

Respondents’ Submissions

It is submitted for the respondents that the termination of the Petitioner’s services was lawful for the reason that the 1st Respondent in exercise of his authority and/or discretion found that the Petitioner was culpable of high level of dishonesty, lack of integrity, accountability which allegations among others amounted to gross misconduct on the part of the Petitioner.

Counsel refers to the clashes between the petitioner and the Public Service Board to prove that the Petitioner was biased, openly rude, unofficial and inept. For instance a letter dated 24th February 2017- annexure III in the supporting affidavit where the Petitioner writes as follows:-

Ref: CG/NDI/HRM/2/27.VOL1 (134)

To The Secretary,

Nandi County Service Board KAPSABET

“...I wish to remind you that officers in the Executive Arm of Government can only communicate to the Public Service Board through their respective Chief Officers or the County Secretary as the Head of Public Service. Any Contrary communication will amount to “insubordination” whose consequences the Board is or should be aware of...”

It is the Respondent’s position that this letter is one that shows that the Petitioner was issuing letters to various departments without express authority from the County Executive committee.

Counsel for the Respondents also refers to a Memo dated 1st March 2017 from the petitioner to his seniors christened as “SUMMONS TO APPEAR BEFORE THE COUNTY PUBLIC SERVICE BOARD” ...The Petitioner is recorded stating that ... it is therefore irregular for members of staff to appear before the Board without the authority of the relevant Chief Officer or the County Secretary. Such acts will amount to insubordination...”

That these two correspondences demonstrate the nature of unprofessionalism and insubordination. Further that the Petitioner was meting out his anger and dissatisfaction to Chief Officers, Chief of Staff and CECs who are his seniors and colleagues sitting in the County Executive Committee unnecessarily and without any legal justification.

Counsel places reliance on the case of **National Union of Mineworkers and Another and the Commission for Conciliation Mediation and Arbitration, Case No. TR 2512 of 2007** where the court observed that an employment relationship can only exist in an atmosphere of trust and subject to an employee acting in good faith.

It is submitted that the Petitioner being the County Secretary ought to have acted with due diligence, good faith in undertaking his work and in this case, handling of the respondents matters of public importance, under section 44 of the County Government Act.

It is further submitted that the Petitioner failed to demonstrate in his petition, precisely, painlessly and with ease how his rights were violated. Counsel cited the cases of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR* on meaning of public interest and tenets of a Petition, and also *Anarita Karimi Njeru v Republic [1979] eKLR*.

That the Petitioner contributed by his conduct to his own termination of service when he unprofessionally, unfairly dismissed casual workers and removed names of other staff from the payroll without involving the County Service Board. Counsel refers to a letter dated 7th March, 2017, annexed to the Respondents' replying affidavit:

"REF: No. NCPSB/CIRCULAR/VOL.1/017/21

TO. All Chief Officers

Chief of Staff

All Members of Staff

RE: COMMUNICATION WITH THE COUNTY PUBLIC SERVICE BOARD

"... The Board does not need to seek authority from anyone, including the County Secretary; to invite any officer especially on matters that it feels need direct clarification from the relevant officer(s)..."

"...Please be informed that failure to honour such invitations amount to insubordination on the part of the officer concerned."

It is submitted on behalf of the Respondents that the above letter clearly indicates that the relationship between the Petitioner and the Respondents was too frosty and had crumbled and may not be resuscitated by this Court, as the actions/omissions committed by the Petitioner contributed largely to the rift between him and other colleagues and/or other employees, especially his seniors.

That the Petitioner could not micromanage the office of county secretary as his contract had reached an end by virtue of the elections of August, 2018, a fact which vitiates his reliance on constitutional provisos, and on this limb, the common law doctrine of estoppel arises, he could not be reinstated to that position. Counsel cites the case of the *Gladys Boss Shollei - VS- Judicial Service Commission (2014) eKLR* where the Court found that –

"there could be no reinstatement and if there was, this would have rendered the company difficult to operate ... and may be quite difficult to implement... the Court observed that one cannot force an employee on an employer..."

That the orders the Petitioner seeks are not practically possible to comply with and in Counsel's view, there is a deliberate scheme by Petitioner to use the court to sanitize an illegality which has been committed by an employee who wants to run away with undue advantage in a contest.

That it is practically impossible for the Court to order a re-instatement or re-engagement between the Petitioner and the Respondent, since it is apparent and very clear in the circumstances of this case that the Petitioner has failed to meet the threshold. It is clear that the mistrust, woes and lack of confidence will worsen and will render the remainder of Contract intolerable.

It is also submitted that the Respondents were therefore justified in appointing another person to act in the office of the County Secretary and thereafter appoint a person substantively.

Counsel submits that the Petitioner is not entitled to any of the remedies sought as the dismissal was justified and as such the suit should be dismissed with costs.

Determination

Having considered the pleadings and submissions on record, the issues arising for determination are whether the petitioner has proved violation of his fundamental rights and freedoms under the constitution by the respondents and if he is entitled to the prayers sought.

From the outset, I must point out that the respondents did not file a replying affidavit in response to the petition. What the respondents filed was a response to the petition. For that reason the factual averments made in the petitioner's affidavits are uncontested. These are that the petitioner was employed on a 5 year fixed term contract commencing 6th June and expiring on 6th June 2018, that served in the position until 13th July 2017 when he received the letter of termination of service which was to take effect immediately.

It is not contested that the petitioner was not given a hearing before his removal as is evident from the letter of termination that has reproduced below–

Ref: CG/NDI/HRM/2/22.VOL.III/208 11th July 2017

FRANCIS OMINDE

P. O. BOX 802 – 30300

KAPSABET

RE: TERMINATION OF SERVICE

I have noted with immense regret that you have been conducting the affairs of the Nandi County Government without any regard to the appointing authority which is myself, and/or the direction of the County Executive Committee.

Among other things, you have;

- a) Purported to remove public servants from the payroll,*
- b) Refused to take lawful instruction from myself;*
- c) Written numerous letters and memos to various departments and agencies of the County Government purporting to issue directives not authorised by the County Executive Committee,*
- d) Wilfully and deliberately refused to implement the decisions and directives of the County Executive Committee,*
- e) Purported to initiate the process of removing members of the County Public Service Board from office.*

Please note that these acts amount to gross misconduct, violation of the Constitution of Kenya 2010, the County Governments Act and other written laws, insubordination and abuse of office.

Section 44(3)(c) and (d) of the County Governments Act provide that it is your duty to convey the decisions of the County Executive Committee to the appropriate persons or authorities; and to perform any other functions AS DIRECTED by the " County Executive Committee.

Please note that a County Secretary can only derive his/her powers from the County Executive Committee.

The purpose of this letter is to communicate my decision to relieve you of your - duties in accordance with Section 44(2)(c) of the County Governments Act. You will be required to hand over the office to Dr. Francis Kipkemboi Sang, who has been I informed of his appointment in a separate letter, within 24 hours of receipt of this letter. The Deputy Governor will oversee this process.

You will be paid one month salary in lieu of notice and any other benefits due to you.

SIGNED

H. E. DR. CLEOPHAS KIPROP LAGAT

GOVERNOR

Cc Council of Governors

Deputy Governor

County Commissioner – Nandi

Clerk – Nandi County Assembly

CEC Finance, Economic Planning & ICT

Chairman, Nandi County Public Service Board”

Section 44(2)(c) provides that

The County Secretary –

(a) ...

(b) ...

(c) **May, subject to the conditions and terms of appointment, be dismissed by the Governor.**

It is the petitioner's claim that the respondents contravened Articles 19, 20, 23, 35, 40, 47, 50, 159, 185, 201 and 258 of the constitution and that this court has jurisdiction to grant appropriate relief under Articles 3, 19, 20, 23, 35, 40, 41, 47, 150, 159, 162(2), 165(3) (b), 175(a), 185, 258 and 260 of the constitution.

In the submissions however, he cites Articles 27 and 28 which were not pleaded in the petition.

Article 47 provides for the right to fair administrative action. In the case of *County Assembly of Kisumu and 2 Others –V- Kisumu County Assembly Service Board and 6 Others* (supra) the Court of Appeal held that the rule of law encompasses fair administrative action and due process. The court cited with approval the decision of Lord Denning in *Kanda –V- Government of Malaya* in which he stated

“If the right to be heard is to be a real right which is worthy anything, it must carry with it a right in the accused man to know the case which is made against him... and then he must be given a fair opportunity to correct or contradict them.”

Lord Hodson in *Ridge –V- Baldwin* further stated

“There I find an unbroken line of authority to the effect that an officer cannot be dismissed without first telling him and hearing of his defence and explanation.”

In the present case the respondents have made very many accusations against the petitioner. Unfortunately all these accusations were brought to the attention of the petitioner in the letter of termination. He was never given any prior notice of the allegations. He was never given opportunity to defend himself against the allegations. It was *fiat accompli* by the time the petitioner learned about the accusations against him.

Section 4(3) of the Fair Administrative Action provides –

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

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

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

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

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

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

(f) notice of the right to cross-examine or where applicable; or

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

As I had stated in the ruling delivered in respect of the petitioner's application filed with this petition delivered on 24th August 2017, the 1st respondent was exercising powers of a public office when terminating the contract of the petitioner. Such powers are delegated by the people and must be exercised within the confines of the law as provided in Article 1 of the Constitution as follows –

1. Sovereignty of the people.

(1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.

(2) The people may exercise their sovereign power either directly or through their democratically elected representatives.

(3) Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—

(a) Parliament and the legislative assemblies in the county governments;

(b) the national executive and the executive structures in the county governments; and

(c) the Judiciary and independent tribunals.

(4) The sovereign power of the people is exercised at—

(a) the national level; and

(b) the county level.

(Emphasis added)

The petitioner being a public officer his appointment was further governed by national values and principles of governance including the rule of law as set out in Article 10, 236 of the Constitution. The said provisions are follows-

10. National values and principles of governance.

(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.

236. A public officer shall not be—

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

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

The Petitioner's appointment is also subject to fair labour practice as provided under Article 41 and fair administrative action as provided in Article 47 of the Fair Administrative Actions Act. The petitioner's appointment is further subject to the provisions of articles 129 and 235 which apply to all public officers. The said provisions are as follows:

129. (1) Executive authority derives from the people of Kenya and shall be exercised in accordance with this Constitution.

(2) Executive authority shall be exercised in a manner compatible with the principle of service to the people of Kenya, and for their wellbeing and benefit.

235. (1) A county government is responsible, within a framework of uniform norms and standards prescribed by an Act of Parliament, for—

(a) establishing and abolishing offices in its public service;

(b) appointing persons to hold or act in those offices, and confirming appointments; and

(c) exercising disciplinary control over and removing persons holding or acting in those offices.

Article 2(4) of the Constitution further provides that "any act or omission in contravention of this Constitution is invalid".

Further Article 41 provides for the right to fair labour practices which entail the protection of the right to employment and the removal from employment only after due process, as provided under Article 236. From the foregoing it is evident that the respondents did not comply with Articles 1, 41, 47, 129 and 236 of the constitution.

The petitioner further submitted that the respondents failed to comply with Sections 41, 44, 45, 46 of the Employment Act. The petitioner's appointment was not under the Employment Act but Section 44 of the County Governments Act which specifically provides that he may be dismissed by the Governor subject to the conditions and terms of his appointment. In his letter of appointment no reference is made to the Employment Act.

In the case of *The County Government of Nyeri and the Governor of Nyeri –V- Cecilia Wangeci Ndungu* the Court of Appeal observed –

“Applicability of the Employment Act:

The Employment Act was enacted to govern the relationship of an employer and employee under a contract of employment. Part VI provides an elaborate due process to be followed in the case of termination/dismissal of employees. It provides for the right to be notified of the intention to dismiss and a fair hearing.

Article 260 of the Constitution defines a State Officer as a person holding a State Office. The said Article sets out the following offices as State offices: -

- a. President;*
- b. Deputy President;*
- c. Cabinet Secretary;*
- d. Member of Parliament;*
- e. Judges and Magistrates;*
- f. Member of a commission to which Chapter fifteen applies;*
- g. Holder of an independent office to which Chapter fifteen applies;*
- h. Member of a County Assembly, Governor, or Deputy Governor of a County, or other member of the Executive Committee of a County Government;*
- i. Attorney General;*
- j. Director of Public Prosecutions;*
- k. Secretary to the Cabinet;*
- Principal Secretary;*
- m. Chief of the Kenya Defence Forces;*
- § Commander of a service of the Kenya Defence Forces;*
 - o Director-General of the National Intelligence Service;*
- p. Inspector General, and the Deputy Inspectors- General, of the National Police Service; or*
- q. An office established and designate as a State Office by national legislation. Emphasis added.*

We are of the considered view that the Employment Act does not apply to State Officers. A State Officer's terms and conditions of service are regulated by the Constitution or the relevant Statute, principles of fair administrative action and rules of natural justice. It therefore follows that a member of the County Executive Committee being a State Officer is not subject to the provisions of the Employment Act.

The Employment Act is thus not applicable in the present suit.

In the case of *Narok County Government and Another –V- Richard Bwago Birir and Another* (supra) the Court of Appeal held that –

“The appellants violated Birir's right to fair administrative action under Article 47 and fair labour practices under Article 41 after

he was unlawfully terminated from his employment.”

In that case Mr. Birii was removed from office by the Governor of Narok County in similar manner as the petitioner herein.

Having found that the respondents contravened Articles 41, 47 and 236 of the constitution, I find and hold the termination of employment of the petitioner to have been unconstitutional in terms of Article 2(4) which provide that “**any act or omission in contravention of this constitution is invalid.**”

Remedies

Article 23 of the Constitution empowers this court to grant appropriate relief for denial, violation or infringement of a right or fundamental freedom. Having found that the respondents violated the petitioner’s rights to fair labour practice, fair administrative action and protection from removal from office without due process of law, I declare the termination of his employment by letter dated 17th July 2017 to have been unconstitutional and therefore invalid.

However in view of the fact that the term of his contract has already expired, having expired on 6th June 2018, I cannot grant him a declaration that he is still the County Secretary of Nandi County as prayed.

Having found the termination invalid, the petitioner is entitled compensation for the violation of his constitutional rights. I award him compensatory damages for both the loss of earnings from July 2017 to June 2018 and for the violation of his constitutional rights in the total sum of Kshs.3,500,000.

The decretal sum shall attract interest at court rates from date of judgment.

DATED AND SIGNED AT NAIROBI ON THIS 22ND DAY OF JANUARY 2019

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 28TH DAY OF FEBRUARY 2019

MATHEWS NDERI NDUMA

JUDGE