



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 1327 OF 2012

BETWEEN

GILBERT ATEI ONSOMU.....CLAIMANT

VERSUS

1. PALIAMENTARY SERVICE COMMISSION

2. HON. JAMES ONDICHO GESAMI.....RESPONDENTS

Rika J

Court Assistant: Benjamin Kombe

Nyamweya Mamboleo & Company Advocates for the Claimant

S.M. Mwenda, Advocates for the 1st Respondent

Waruhiu K, Owade & Ng'ang'a, Advocates for the 2nd Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 6th August 2012. He avers he was employed by the Respondents on 1st July 2008, as the Constituency Office Manager for West Mugirango Constituency, at a gross monthly salary of Kshs. 50,000.
2. He was employed on a fixed term contract, which would expire with the parliamentary term of the 2nd Respondent, who was elected Member of Parliament [MP], for West Mugirango Constituency.
3. On 8th March 2010, the 2nd Respondent suspended the Claimant from Office without justifiable cause. No disciplinary hearing of any shade followed the suspension. The Claimant was not heard. Suspension was not lifted. He remains under suspension.
4. The Claimant avers he is entitled to salary and other benefits for the balance of his contract period of 34 months, from the date of suspension to the expiry of the 2nd Respondent's parliamentary term. He prays for Judgment against the Respondents for:-
 - a) Kshs. 1,850,000 being the accrued gross salary from the time of suspension, until the expiry of the 2nd Respondent's parliamentary term.
 - b) Accrued annual leave amounting to Kshs. 57,534.
 - c) Accrued interest on the above.
 - d) Gratuity amounting to Kshs. 976,500.
 - e) General damages for breach of contract.
 - f) General damages for mental suffering and anguish.

g) Costs.

h) Any other suitable relief.

5. The 1st Respondent filed its Statement of Response on 18th September 2012. Its position is that there was no employer-employee relationship, between the 1st Respondent and the Claimant. The Claimant was engaged by the 2nd Respondent on 1st January 2008 as the West Mugirango Constituency Office Manager, pursuant to Regulations 21 and 22 of the Parliamentary Service [Constituency Offices] Regulations 2005 [The Regulations]. His services were terminated by the 2nd Respondent under Section 44 of the Employment Act, after the Claimant fundamentally breached clause 5 of his contract. The Claim discloses no cause of action against the 1st Respondent. The 1st Respondent urges the Court to dismiss the Claim with costs.

6. The Statement of Response by the 2nd Respondent was received by the Court on 25th September 2012. His position is that the Claimant was an Employee of the 1st Respondent under the Parliamentary Service [Constituency Offices] Regulations, 2005. The 2nd Respondent engaged the Claimant in the 2nd Respondent's capacity as a Member of Parliament, not in his personal capacity. The 2nd Respondent concedes he suspended the Claimant, but denies that this was done without justifiable cause. The Claimant's contract was terminated through a letter dated 28th September 2010. The 2nd Respondent asks the Court to dismiss the Claim with costs.

7. Through an Application dated 14th September 2012, the 1st Respondent asked the Court to order that the 1st Respondent is discharged from the proceedings, having been improperly sued. The Court declined the Application, holding that should the Claim succeed, it would be the 1st Respondent who would be liable to satisfy the decree. The 1st Respondent sought review of this Ruling, through an Application dated 30th May 2017. Review was declined on 17th September 2018.

8. The matter came up for full hearing during the Court's service week, on 18th October 2018. The matter was filed in 2012. In view of the Judiciary Policy to dispense with matters filed on or before 2013 by end of 2018; owing to inadequacy of time to conduct a full oral hearing; and considering that the issues in dispute are mainly legal in nature, the Court made the following orders:-

a) Advocates consult, and agree, if they wish to go by way of Written Submissions.

b) If agreed, they file and exchange Written Submissions within 30 days.

c) If this is done Judgment to be delivered on notice.

d) The file shall be forwarded to the Court in Mombasa for judgment-writing.

e) If there is no agreement, the file shall be placed before another Judge at the end of 30 days.

9. Parties agreed to go by way of Written Submissions. The Claimant filed his Submissions on 22nd November 2018; the 1st Respondent on 5th December 2018; and the 2nd Respondent on 10th December 2018. The file was forwarded from the Court at Nairobi, to the undersigned Judge at Mombasa, on 10th December 2018.

Claimant's Submissions

10. The Claimant submits that the 1st Respondent is conferred powers, pursuant to Section 36 of the Parliamentary Service Act to make Regulations. The 1st Respondent made the Parliamentary Service [Constituency Offices] Regulations, 2005. It has supervisory mandate over the affairs of the Constituency Offices. The Claimant was engaged by the 2nd Respondent, acting as an agent of the 1st Respondent.

11. Termination of the Claimant's contract was not done in accordance with the Employment Act 2007. The Claimant's rights to fair labour practices and fair administrative action under Articles 41 and 47 of the Constitution were violated. He asks the Court to find persuasion in ***Shankar Saklani v. DHL Global Forwarding [K] Limited [2012] e-KLR***, where it was held that an Employer, in terminating an Employee's contract, is bound to accord an Employee the right to fair administrative action, through observation of rules of natural justice, as expressly envisaged under Section 45[5] of the Employment Act 2007. The Claimant was not heard, in accordance with Section 41 of this Act, and there was no proof of reason or reasons to justify termination, under Section 43 of the Act. Hearing and proof of reason, or reasons, are mandatory requirements in fair termination, as held in ***Kenya Union of Commercial, Food and Allied Workers v. Meru North Farmers Sacco Limited [2014] e-KLR*** and ***George Onyango Akuti v. G4S Security Services Kenya Limited [2013] e-KLR***.

12. On the right of the Claimant to have salaries withheld by the Respondents for the period he was under suspension, the Claimant relies on ***Thomas Sila Nzivo v. Bamburi Cement Limited [2014] e-KLR***, where it was held that the salary of an Employee is protected under Part 1V of the Employment Act, and cannot be denied to the Employee as a form of a disciplinary sanction.

13. It is submitted for the Claimant that he was entitled to 21 days of annual leave under his contract. He is entitled to 31% of his basic salary as gratuity, in accordance with Regulation 23. It is Claimant's submission that his contract was cut short irregularly, and general damages for breach of contract are payable. He was bereft of any source of income during the period of indefinite suspension. He suffered mental anguish and was unable to meet his and his family's needs. He merits general damages for emotional injury. The Claimant submits he is entitled to costs.

1st Respondent's Submissions

14. The 1st Respondent submits that the 2nd Respondent suspended the Claimant on 8th March 2010, as the Claimant's Employer, not as an agent of the 1st Respondent.

15. The Claimant's contract was terminated by the 2nd Respondent on 28th September 2010. He did not remain on indefinite suspension until the expiry of the 2nd Respondent's parliamentary term.

16. Termination was on valid ground. The Claimant fundamentally breached his obligations under clause 5 of his contract, by disclosing unauthorized information with respect to the affairs of the 2nd Respondent.

17. The 1st Respondent is a Constitutional Commission, established under Article 127 of the Constitution of Kenya, and Section 7 of the Parliamentary Service Act.

18. The 1st Respondent is charged with the responsibility to provide services and facilities, to ensure the effective functioning of Parliament. It does this by allocating money for each Member of Parliament, to hire staff and operate the Constituency Office, in their respective Constituencies.

19. The Regulations are enacted to guide Members of Parliament on running their Constituency Offices, and cover general basic principles on prudent management of Public Office.

20. Pursuant to the Regulations, Members of Parliament are entitled to employ their own staff, to help them run Constituency Offices. Such staff, are different from staff of the 1st Respondent, the Parliamentary Service Commission, whom under Section 10 of the Parliamentary Service Act, the 1st Respondent is mandated to prescribe a scheme of service.

21. Regulation 22 of the Parliamentary Service [Constituency Offices] Regulations, 2005, mandates Members of Parliament, to initiate recruitment of all the Constituency Office staff, and determine their terms of employment and salary scales.

22. The Regulations define 'staff' to mean 'an Employee or Employees of a Member of Parliament, working for the Member in the Constituency Offices.'

23. Members of Parliament therefore, independently employ their own staff, which includes the Constituency Officers, Members' Drivers, and Personal Assistants, on contract.

24. Regulation 13 provides that on 31st March of each year, before the commencement of the ensuing financial year, the Member shall forward to the Commission the budget estimates for the purchase of office furniture, equipment, consumables and personnel emoluments for staff at the Constituency Office, but such budget shall not exceed Kshs. 3.36 million in each financial year, or such amount as may be set by the Commission.

25. The 2nd Respondent, like other Members was required to submit his budget estimates and supporting documents, including copies of the contracts of employment to the 1st Respondent. The rationale is that the 1st Respondent facilitates Members with funds to run their Constituency Offices. The 1st Respondent has no role whatsoever, in recruitment and dismissal of Constituency Office staff.

26. The Claimant and the 2nd Respondent entered into a standard contract of employment. It was subject, like all contracts, to the doctrine of privity. A contract cannot, as a general rule, confer rights or impose obligations arising under it, to any person except the Parties to the contract.

27. The 1st Respondent cites the decision of the *Court of Appeal in Mombasa CA Civil Appeal No. 59 of 2014 between Parliamentary Service Commission v. George Okoth Owuor & 2 others*, in support of this proposition. The Court of Appeal found that the Employment and Labour Relations Court had misdirected itself, by inferring an agency relationship between the Parliamentary Service Commission and a Member of Parliament, in employment of Constituency Office staff. It was the position of the Court of Appeal that even if it was necessary to infer agency, the Parliamentary Service Commission had fulfilled its legal obligation, by providing the funds to the Member of Parliament for running of the Constituency Office. The Court of Appeal decision was quoted with approval, by this Court, in its *Cause No. 320 of 2014 at Kisumu, between Andrew Tubei Mulati v. Enoch Wamalwa Kibunguchy & Another*.

28. The Claimant was informed by the 2nd Respondent of the allegations against him in writing. It is now firmly established that an opportunity to be heard, need not be an oral hearing. The 1st Respondent relies on the Court of Appeal decision in *Kenya Revenue Authority v. Menginya Salim Murgani [2010] e-KLR* on the nature of the opportunity to be heard. Provided a degree of fairness is achieved, there is no requirement for oral hearing in all cases.

29. The 1st Respondent concludes with the submission that there was no reasonable ground to have enjoined the 1st Respondent to this Claim.

2nd Respondent's Submissions

30. The 2nd Respondent submits he employed the Claimant on a fixed term contract. The contract period was for the life of the 2nd Respondent's parliamentary term, beginning 1st January 2008. The Claimant's last monthly salary was Kshs. 50,000.

31. The 2nd Respondent submits he suspended the Claimant on 8th March 2010, for disclosing 2nd Respondent's confidential information to 3rd Parties. He also misappropriated funds. He was suspended lawfully under clause 5 of his contract. He was given an opportunity to respond to the allegations. He failed to do so, and his contract was terminated through a letter dated 28th September 2010.

32. The 2nd Respondent identifies the issues in dispute to be:

- Who employed the Claimant?
- Was termination fair?
- Is the Claimant entitled to the remedies sought?
- Who should bear the costs of the Claim?

33. On the 1st issue, the 2nd Respondent submits that Regulation 21 [a] provides for the Office of Constituency Office Manager. Regulation 22 mandates Members of Parliament to initiate, with the concurrence of the 1st Respondent, recruitment of Constituency Office staff. Regulations 23, 25, 26, and 27 provide the terms of service, while Regulation 29 prescribes duties and responsibilities of staff. Regulation 13 provides that personnel emoluments for Constituency Office staff are approved and paid as part of Constituency budget.

34. The 2nd Respondent employed the Claimant, in 2nd Respondent's official capacity as a Member of Parliament, and not in a personal capacity. No cause of action can lie against the 2nd Respondent. The 2nd Respondent can be viewed as an agent of the 1st Respondent. The law does not permit an agent to be sued alongside a disclosed principal. The 2nd Respondent urges the Court to find that the Claimant was an Employee of the 1st Respondent, not of the 2nd Respondent.

35. On the 2nd issue, the 2nd Respondent submits that the 2nd Respondent, as an agent of the 1st Respondent, gave the Claimant an opportunity to respond to the allegations leveled against him. He did not respond. His rights under Articles 41 and 47 of the Constitution, as well as Section 41 of the Employment Act, were respected.

36. The Claimant was given ample opportunity to be heard through the letter of suspension. The 2nd Respondent, like the 1st Respondent, submits that an opportunity to be heard need not comprise an oral hearing. The 2nd Respondent cites **Andrew Oloo Otieno v Kenya Sugar Board [2017] e-KLR**, in support of this submission.

37. Dismissal of the Claimant was fair and lawful, in conformity with the Constitution of Kenya, the Employment Act and the Claimant's contract.

38. On remedies, the 2nd Respondent's position is that the Claimant acted in breach of his contract, and is therefore not entitled to the remedies sought. The Claimant cannot be allowed to benefit from his breach of contractual obligations. He was the cause of his own misfortune.

39. Lastly, the 2nd Respondent submits that Courts have discretion in awarding of costs.

40. The issues in dispute, as understood by the Court, are as identified by the 2nd Respondent, at paragraph 32 of this Judgment. The issues are similarly identified by the Claimant at paragraph 7 of his Submissions, and at paragraph 7 of 1st Respondent's Submissions.

The Court Finds:-

A. Who was the Employer?

41. The Claimant and the 2nd Respondent signed a document titled 'Contract Agreement for Constituency Office Staff' on 1st January 2008. A second Agreement was executed between the Claimant and the 2nd Respondent, on 1st July 2008.

42. The Claimant was appointed Constituency Office Manager. His salary was Kshs. 50,000. There are only 2 terms of the Agreement in the main document. The 1st designates the Claimant as Constituency Office Manager, acting according to the instructions of the Employer. The 'Employer' shall mean the Member of Parliament. The 2nd term of the Agreement sets the Claimant's monthly salary at Kshs. 50,000.

43. The main Agreement, containing these basic terms of employment, is signed by the Claimant and the 2nd Respondent. From the perspective of the 1st page of the Agreement which is signed by the Claimant and the 2nd Respondent, it is clear who the Employee and the Employer is.

44. The core details of the contract of employment are contained in the Schedule to the Agreement. In answering the question who was the Employer to the Claimant, there must be a close scrutiny of the Schedule to the Agreement. The Schedule contains majority of the terms, conditions and particulars of employment. The period of employment; duties; salary; discipline; annual leave; termination; and administration of benefits scheme, are all captured in what is characterized as Schedule to the Agreement.

45. The Agreement and the Schedule are standard contract documents, generated by the 1st Respondent. The 1st Respondent is an Independent Constitutional Commission, created pursuant to Article 127 of the Constitution of Kenya and the Parliamentary Service Act, No 10 of 2000. Its functions include provision of services and facilities to ensure efficient and effective functioning of Parliament; exercising

budgetary control over Parliamentary Service; and promotion of the ideals of Parliamentary Democracy.

46. The 1st Respondent is mandated to make Regulations under Section 36 of its constitutive Act, to enable it achieve its objectives. The Parliamentary Service [Constituency Offices] Regulations, 2005 are created under this mandate. The Regulations create the Constituency Offices. The Claimant's Office is created by the Regulations. He was appointed pursuant to the Regulations. The Agreement between him and the 2nd Respondent, is crafted by the 1st Respondent, under the Regulations, and is aimed at attainment of the 1st Respondent's objectives, in particular, the efficient and effective functioning of Parliament, and promotion of the ideals of Parliamentary Democracy.

47. The terms and conditions contained in the Schedule to the Agreement are not authored by the Member of Parliament; they are standard terms and conditions, crafted by the 1st Respondent, intended to achieve certain objectives of Parliamentary Service.

48. Although crafted to define the Member of Parliament as the 'Employer' the Schedule discloses a heavy involvement of the 1st Respondent, in the employment of the Constituency Office staff. As stated at the outset, the contracts are authored by the 1st Respondent in standardized forms. The Member of Parliament and the Employees merely fill in their names, dates of commencement, designation and monthly salary payable. The other details are standard terms and conditions of service, crafted by the Parliamentary Service Commission.

49. The Schedule to the Agreement requires that the Employee shall conform to the General or Standing Orders of the Commission, the 1st Respondent herein. The Employee shall be subject to the Commission Regulations.

50. Where an Employee is involved in acts of indiscipline, the Employer may, on direction by the Commission, terminate the contract forthwith. The 1st Respondent directs the 2nd Respondent on termination of contracts of employment, of Constituency Office staff.

51. The Schedule states that an Employee shall have the right of appeal, against any decision of the Employer or the Commission, that has the effect of withholding, suspending, reducing or otherwise altering to his/her detriment, any benefits due to him/her or his/her estate. The Employee has a right of appeal under this clause, against both the Member of Parliament and the Parliamentary Service Commission. The Commission can make a decision against an Employee. The Employee has a right of appeal against the Commission. This clause would not be there, without a contractual foundation.

52. The clause on termination of contract is quite revealing. The Employer, who according to the Agreement is the Member of Parliament, may terminate the contract by giving the Employee 3 months' notice in writing, or by paying to the Employee, 1 month salary in lieu of notice. It is not clear why notice pay should be less than the notice period of 3 months.

53. The Schedule to the Agreement states that the Employee may terminate the contract, by giving a written notice of 3 months to the Member of Parliament. However, in lieu of notice, the Employee shall pay 1 month salary to the Parliamentary Service Commission. Notice pay is receivable by the Commission, not by the Member of Parliament.

54. Further, it is stipulated that if the Employee terminates the contract otherwise than in accordance with the Agreement, the Employee would pay to the Parliamentary Service Commission liquidated damages of 3 months' salary. Such damages are not expressed to be payable to the Member of Parliament, who is described as the Employer.

55. Failure by the Employee to comply with Order, Standing Order or Commission's or Member's instructions would result in deduction from the Employee's salary, to meet any pecuniary damages arising from the Employee's default. The 1st Respondent, under this clause, is shown capable of issuing instructions to Constituency Office staff, and to recover pecuniary damage from staff salary, for failure to follow instructions. The Commission may also recover any other amount owed by the Employee to the Commission through salary deductions.

56. The Employee may also become a member of permanent and pensionable service of the Commission.

57. The Schedule to the Agreement, which is part of the contract of employment, persuades the Court that the Respondents were Joint-Employers, of the Claimant. The Respondents were not in any principal-agent relationship. None employed the Claimant singly. They were Joint-Employers under the contract.

58. The definition 'staff' under the Regulations to comprise Employee, or Employees working for the Member of Parliament, and the Regulation requiring Members of Parliament to recruit Constituency Office staff, do not rule out the reality of the Respondents being Joint-Employers under the contract, and employment law.

59. The description of the term 'Employer' under the contract, similarly does not in law, rule out the presence of Joint-Employers. To determine who the Employer is, a trier of facts must examine the contract document and other evidence relevant to that contract, carefully. The contents of the contract, strongly establishes the presence of Joint-Employers. The definition of the Member of Parliament, as the 'Employer' in the contract on record, is neither exclusive nor conclusive. The 1st Respondent certainly dictated the essential terms and conditions of employment. The Claimant's contract was a by-product of two layers of control.

60. Section 9 [2] of the Employment Act 2007 states that an Employer who is party to a written contract, shall be responsible for causing the contract to be drawn, stating particulars of employment, and that the contract is consented to by the Employee.

61. The contract in dispute is a standard parliamentary document, drawn by the Parliamentary Service Commission, and distributed to Members of Parliament to fill in their details and details of their Employees. The 1st Respondent caused the document to be drawn.

62. There is no requirement under the Employment Act, that the Employer signs the contract of employment. The focus is on the Employee, who must signify consent by signing his name thereon, or imprint thereon an impression of his thumb or one of his fingers, in the presence of a person other than his Employer. It is not therefore important that the Employer is shown to have signed, or not signed, the contract of employment.

63. Section 36 of the Employment Act provides that either Party, to a contract of service which Section 35 applies, may terminate the contract without notice, upon payment to the other Party, of remuneration which would have been earned by the other Party in respect of the period of notice required to be given. Notice pay relates to parties to a contract of employment. The Agreement crafted by the Parliamentary Service Commission, through which the Claimant was employed, required the Parliamentary Service Commission to receive notice pay, from the Claimant, in event of termination without a written notice. The 1st Respondent would have to be a party to the contract, to receive notice pay. Written notice, or notice pay, on termination, is an elementary term in an employment relationship. It is not a term which can be extended to parties who are outside the contract of employment.

64. Section 19 allows Employers to deduct from Employees' salaries. Deductions are of such nature, as the 1st Respondent was allowed to deduct from the Employee's salary under the contract of employment. A 3rd Party has no legal capacity to make any deductions on Employee's salary. If the 1st Respondent was not an Employer, on what basis would the 1st Respondent deduct from Claimant's salary?

65. Termination of employment contracts on disciplinary grounds, under Sections 41, 44 and 45 of the Employment Act, is a preserve of Employers. The 2nd Respondent could only terminate Claimant's contract on disciplinary grounds, under the contract, on the direction of the 1st Respondent. On what basis would a stranger be taking disciplinary control, by directing the Employer when to dismiss his Employee? There was potential for the Claimant to graduate, to a member of 1st Respondent's permanent and pensionable service. It would not be possible for the Claimant to access 1st Respondent's pension scheme, without the 1st Respondent and the Claimant, being in a contract of employment. Pensions and Pension Schemes, relate to terms and conditions of employment. They are included in employment particulars under Section 10(3)(a)(iii) of the Employment Act.

66. The Schedule to the Agreement, read together with the Employment Act, leaves the Court with no doubt, that the Parliamentary Service Commission, was intended to be, and was, a Joint-Employer with the Member of Parliament, West Mugirango Constituency, of the Constituency Office Manager.

67. The Respondents by their very constitutional positioning, share or codetermine, matters governing the terms and conditions of employment of Constituency Office staff. For Joint-Employer status to exist, it has to be shown that an entity meaningfully affects matters relating to the employment relationship, such as hiring, firing, discipline, supervision and direction of the Employee. The 1st Respondent was involved in more than one of these areas, under the contract. This is clearly shown in the contract document. It would not be possible for the 1st Respondent to attain its objectives without such involvement. Direct, or indirect, control of an Employee by an entity, is sufficient to establish the presence of Joint-Employer.

68. The Court does not think that in view of these findings, privity of contract is a relevant principle, in determining this dispute. The 1st Respondent drew, or caused to be drawn, the contract in question and was party to the contract. It cannot be said that the 1st Respondent was a stranger to the contract, and excluded from the obligations and rights created under the contract, through the doctrine of privity of contract.

69. With respect to the decision of the Court Appeal cited by the 1st Respondent, **Parliamentary Service Commission v. George Okoth Owuor & 2 others**, the Court is aware that decisions of the Court of Appeal bind the Employment and Labour Relations Court. Precedents resulting from similar disputes, from the Court of Appeal, bind all Courts below the Court of Appeal. This is meant to ensure case-law is predictable, and does not become an incoherent mixture of conflicting legal opinions of different Courts. The 1st Respondent did not clarify to the Court however, if the whole contract document, including the Schedule to the Agreement, was placed before the Court of Appeal. Reference is made in the Judgment of the Court of Appeal, at page 9, to the part of the contract titled 'Contract Agreement for Constituency Office Staff.' This is the part containing the names of the Parties, the designation of the Employee, and description of the term 'Employer.' What is contained at page 9 of the Judgment is the preamble and clause 1 of the contract document. No more. The Schedule, with the bulk of the terms, the conditions and details of employment, the *essentialia negotii*, is not in the Judgment of the Court of Appeal. It is not possible to tell therefore, whether the Court of Appeal was made aware of the contents of the Schedule to the Agreement. It is not clear if there was a Schedule to the Agreement placed before the Court of Appeal. It is not possible to tell whether similar circumstances obtained, in the Court of Appeal decision, to enable this Court defer to **Parliamentary Service Commission v George Okoth Owuor & 2 others**. Similarly, there is no persuasion in the Ruling of this Court in the case of **Andrew Tubei Mulati v. Enoch Kibunguchy & Parliamentary Service Commission**, which drew its *ratio decidendi*, from the Court of Appeal decision.

70. The Court agrees with the submission of the 1st Respondent, that the Claimant was not an Employee of the 1st Respondent, within the meaning of Section 10 of the Parliamentary Service Act, which requires the 1st Respondent to prescribe a scheme of service setting out terms and conditions for the appointment of staff.

71. The Claimant became an Employee of the Respondents through Section 36 of the Parliamentary Service Act, and the Regulations made under the Act. He became an Employee, under a fixed-term contract, to assist the 1st Respondent, in attaining its mandate. This mandate, as observed elsewhere, includes providing services and facilities to Members of Parliament, to ensure efficient and effective functioning of Parliament; and undertaking singly or jointly with others, to promote the ideals of Parliamentary Democracy. Constituency Office staff discharge parliamentary service. Even when the Member of Parliament's term expires, the Constituency Office Manager, under Regulation 30, continues running the Constituency Office, until a new Member of Parliament is sworn in. Whose Employee is he during this period? The Parliamentary Service Act, does not bar the 1st Respondent, from engaging Employees in conjunction with Members of Parliament, in pursuit of the ideals of Parliamentary Democracy. The Claimant was such an Employee, engaged on fixed term contract, intended to begin and end, with the reign of the 2nd Respondent, as the Member of Parliament for West Mugirango Constituency.

72. Constituency Offices are Public Offices, financed from the exchequer. They are not Private Offices of Members of Parliament. Constituency Office staff cannot be equated to Private Employees such as Domestic Servants of the Members of Parliament. The Members of Parliament are probably paid an allowance to employ Domestic Servants, and there can be no doubt on the nature of contracts, between Members of Parliament and their Private Employees, such as Domestic Servants. The Constituency Office is not a Private or Domestic setup. It is a Public Office. It is central to efficient and effective functioning of Parliamentary Democracy. The staff in this Office discharge parliamentary roles. They are in parliamentary service. One Co-Employer authorizes another to recruit and manage the day to day functioning of Constituency Office staff. One Co-Employer meets the costs of running the Constituency Office, through public funding available by the treasury. The Court does not think that the law intended employment liability that may arise from the Constituency Employee's contract, is shouldered by the Member of Parliament solely, even after the Member of Parliament has long been thrown out of Parliament by electors.

73. The 1st Respondent finances the Constituency Office to a certain defined limit under the Regulations. There is no provision as far as the Court can tell from the record, on liability such as compensation for unfair termination, or damages in torts. Is the 2nd Respondent to bear liability alone? He is no longer a Member of Parliament for West Mugirango Constituency. Any budgetary allocation made to him while he was a Member of Parliament, for running the Constituency Office, must have been exhausted by now. Is he alone, to pay the Claimant, if the Court finds the Claimant merits a monetary award? This cannot have been intended by the law, in creating the Constituency Offices.

74. The Court is satisfied that the Respondents were Joint-Employers of the Claimant. Why would the 1st Respondent receive notice pay in case the Claimant terminated the contract without a written notice? Why would the 1st Respondent exercise the forms of control of the Claimant, discussed above, if it was not intended that the 1st Respondent is a Joint-Employer? The Respondents fit the description of the term 'Employer' under Section 2 of the Employment Act. The definition of the term 'Employer' given under the contract, and the Regulations, cannot override the provisions of the Employment Act.

B. Was termination fair?

75. The Claimant was employed for a period equal to the term served in Parliament by the 2nd Respondent. He was alleged to have been involved in acts of misconduct, before expiry of his contract. He was suspended on 8th March 2010. The letter of suspension does not disclose specific allegations against the Claimant. It states that the Claimant failed to clarify '*some issues pertaining to your office.*' The Claimant states he was not taken through a disciplinary hearing after suspension, and did not receive termination letter.

76. The Respondents state that the Claimant was taken through a fair hearing. He did not have to be heard orally, for the standards of fairness to be satisfied.

77. There is considerable doubt whether the letter of termination was received by the Claimant. Although dated 28th September 2010, the letter is date-stamped 25th April 2012 by the National Assembly, in acknowledgement of receipt. It was received by the National Assembly almost 2 years after being authored.

78. It is likely that the letter was drawn, in anticipation of the filing of the Claim in 2012. The Claimant's position that he was suspended indefinitely and was not taken through a disciplinary hearing, culminating in a letter of termination, is persuasive. There is no evidence that the letter of termination was received by the Claimant. He considered himself on indefinite suspension.

79. There was no disciplinary hearing of any shade, after suspension. The submission that fair hearing, does not require oral hearing of the Employee, is not supported by Section 41 of the Employment Act.

80. Unless the Employee and the Employer are in different geographical jurisdictions, there ought to be an oral hearing as demanded by Section 41. The decisions cited by the Respondents can only be helpful, in situations involving expatriate and/or peripatetic Employees.

81. Section 41 demands that the Employee is heard, in the presence of another Employee, or a shop floor Representative of his Trade Union. This requirement cannot be met, if all that is required is an exchange of correspondence, as suggested by the Respondents. Anything short of a hearing conducted in strict compliance with Section 41 of the Employment Act, does not seem to this Court, to satisfy the minimum statutory standards of fairness. The exception to this requirement could only be, in cases where it is not possible to physically have the Employer, Employee and his Representative, at the disciplinary forum, at the same time.

82. The Claimant was not heard in accordance with Section 41 and 45 of the Employment Act 2007.

83. The contract required the 2nd Respondent, to terminate Claimant's contract, on direction by the 1st Respondent. The Respondents state that the Claimant improperly disclosed information regarding the affairs of the 2nd Respondent to unauthorized persons. This offence is specifically captured in the contract, and justifies termination of the contract, only after the 1st Respondent has directed the 2nd Respondent, to terminate Claimant's contract. There is no evidence that such direction was given. Termination was not in accordance with this term of the contract. It is also alleged by the 2nd Respondent in his Submissions, that the Claimant misappropriated funds. No evidence of this was given.

84. There was no substantive justification. The reason given relating to release of information without authorization was not established. It is not disclosed what information the Claimant communicated to other persons, and who these persons were. It is just an allegation made. There was no valid reason, or reasons shown, justifying premature termination of the Claimant's contract.

85. Suspension was indefinite. The letter indicates suspension was until further notice. Termination letter is not shown to have issued to the Claimant. The earliest the Claimant would be deemed to have received the letter of termination would be 18th September 2012, when the

letter was filed in Court through the Affidavit of Agnes Kamoni, Constituency Liaison Officer. In UK Supreme Court decision, *Societe Generale, London Branch [Respondent] v Geys [Appellant] [2012] UKSC*, which was adopted by this Court in *Alex Kiema Mwinzi v Factory Guards Mombasa Limited [2018] e-KLR*, it was held that termination takes effect only when notice is received by its recipient, or when notice pay is received. The 2nd Respondent wrote a letter of termination dated 28th September 2010, but did not give evidence showing that the Claimant received the letter, on any specific date. Termination would not become effective until the Claimant received the letter of termination.

86. From 18th September 2012, the Claimant did not have reason to hold that he was still under suspension. He became aware that there was a letter of termination.

87. Termination did not comply with Sections 41, 43 and 45 of the Employment Act. It was in breach of the contract of employment.

C. Remedies

88. The Claimant prays for accrued salary from the date of suspension, to the end of the 2nd Respondent's parliamentary term, at Kshs. 1,850,000. The term was a 5-year period running from 2008 to 2013. The Claimant left employment in 2010, and had approximately 3 years to the end of his contract.

89. The Court does not think that the Claimant merits accrued salary for the remainder of the contract. There was no guarantee that he would see out his contract. There was a clause in the contract, enabling Parties to opt out through written notice, or notice pay. The 2nd Respondent terminated Claimant's contract. The Claimant became aware about termination, at least by September 2012. He had no reason to continue thinking, after September 2012, that he was still under suspension. The letter of termination was available to all the Parties from September 2012. In *Peterson Ndung'u & 5 others v. Kenya Power & Lighting Company [2014] e-KLR*, the Industrial Court held that suspension of an Employee should not result in forfeiture of salary for the period of suspension. The contract of employment is still in place during suspension. The decision was upheld on appeal in *Peterson Ndung'u, Stephen Gichanga Gituro, N. Ojwang', Peter Kariuki, Joseph M. Kyavi, & James Kimani v. Kenya Power & Lighting Company [2018] e-KLR*.

90. The Court shall allow the prayer for arrears of salary for the period between the date of suspension, and the date the Claimant is deemed to have learnt about termination. This falls between 8th March 2010 and 18th September 2012. ***At the rate of Kshs. 50,000 a month, the Claimant is granted arrears of salary, over a period of 30 months, at Kshs. 1,500,000.***

91. Clause 9 of the contract gave the Claimant 21 days of annual leave. There are no records showing that he went on annual leave between 2008 and 2010. He claims 35 days. Over a period of 2 years he would be entitled to 42 days. He may have utilized 7 days, and is ***allowed annual leave pay for 35 days, which amounts to Kshs. 67,307***, worked out as [Kshs. 50,000 divide by 26 working days x 35 days].

92. The Claimant prays for gratuity at 31% of the salary accrued for 5 years. Clause 8 of the contract sets gratuity at 25% of the salary paid in the contract period. The superior percentage of 31% is given under Regulations 23. In case of conflict in terms of employment, the Court adopts the terms which favour the Employee. The correct percentage is therefore 31% of the total salary.

93. The Claimant did not serve to the end of his contract. The contract document is silent on payment of gratuity, where the contract ends prematurely. The Regulations state, under Regulation 23 [2], that on premature termination, gratuity shall be paid on pro-rata basis. The Claimant ought to have gratuity based on the period between 1st July 2008 and 18th September 2012. ***Gratuity, over a period of 4 years, is computed and granted at Kshs. 744,000.***

94. The Claimant prays for general damages for breach of contract and separate general damages for mental suffering. The Court has concluded termination was unfair and unlawful. The most suitable remedy for this is compensation under Section 49 of the Employment Act. The Claimant has not persuaded the Court to grant various forms of general damages, rather than compensation for unfair termination, under statute. The Court of Appeal in *Elizabeth Wakanyi Kibe v. Telkom Kenya Limited [2014] e-KLR* held that employment remedies must be proportionate to the economic injury suffered by the Employee. They are not aimed at unjust enrichment, and the Court has a duty to observe the principle of fair go all round, in granting remedies. The Claimant's pursuit of multiple forms of damages, for the same statutory and contractual breach, is not in keeping with the concept of fair dealing at the workplace, between an Employee and an Employer.

95. The Court has taken into account that termination was unfair on procedural as well as substantive grounds. It has been considered that the Claimant was employed on a 5-year fixed term contract. He learnt of termination in September 2012 as concluded by the Court. He has been given an order for payment of arrears of salary for the period between suspension and when he learnt about termination. The Claimant expected to work for the whole period of 5 years. He has been granted the prayer for arrears of salary and proportionate gratuity. He is not shown to have contributed to termination. He had served for 2 years before the indefinite suspension. The Court has considered Section 49 [4] of the Employment Act, and reached the conclusion that the Claimant merits 3 months' salary in compensation for unfair termination. ***He is granted equivalent of 3 months' salary in compensation for unfair termination at Kshs. 150,000.***

96. ***Costs to the Claimant.***

97. ***Interest allowed at 14% per annum from the date of Judgment till payment is made in full.***

98. The Court wishes to thank Advocates for the respective Parties, for their well-researched and well- argued Submissions.

IN SUM, IT IS ORDERED:-

a) Termination of the Claimant's contract was unfair and unlawful.

b) The Respondents shall jointly and severally, pay to the Claimant: arrears of salary at Kshs. 1,500,000; annual leave at Kshs. 67,307; proportionate gratuity at Kshs. 744,000; and equivalent of 3 months' salary in compensation for unfair termination at Kshs. 150,000 – total Kshs. 2,461,307.

c) Costs to the Claimant.

d) Interest allowed at 14% per annum from the date of Judgment, till payment is made in full.

Dated and signed at Mombasa this 23rd day of January 2019.

James Rika

Judge

Dated, signed and delivered at Nairobi this 8th day of March 2019.

Onesmus N. Makau

Judge