



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO. 38 OF 2018

AS CONSOLIDATED WITH ELRC CAUSE NO. 1228 OF 2017

(Before Hon. Justice Hellen S. Wasilwa on 6th March, 2019)

**IN THE MATTER OF ALLEGED VIOLATION AND INFRINGEMENT OF
THE RIGHTS AND FREEDOMS IN ARTICLES 2, 3, 10, 19, 20, 21, 22(1), 23,
25, 27, 28, 29, 30, 33, 35, 41, 47, 48, 50 (1) & (2), 73, 75, 251 (1),
258 (1) & 259 (1) OF THE CONSTITUTION OF KENYA;**

AND

IN THE MATTER OF THE ALLEGED VIOLATION OF THE EMPLOYMENT ACT

AND

**IN THE MATTER OF THE ALLEGED VIOLATION OF THE
EAPCC HUMAN RESOURCES POLICY MANUAL 2012;**

AND

**IN THE MATTER OF THE ALLEGED VIOLATION OF THE
MEMORANDUM AND ARTICLES OF ASSOCIATION OF THE
EAST AFRICAN PORTLAND CEMENT COMPANY LIMITED**

AND

IN THE MATTER OF THE INDUSTRIAL COURT ACT

AND

IN THE MATTER OF THE LABOUR RELATIONS ACT

JUDGMENT

1. The Claimant (who shall be referred to as the Petitioner hereinafter, for purposes of clarity and uniformity) through the firm of Were and Oonge Advocates, filed his Statement of Claim dated 30th June 2017. The Petitioner sought the following prayers:-

a. A declaration that the suspension of the Claimant and failure to furnish him with the reasons and evidence is unlawful.

- b. An order setting aside the suspension of the Claimant.*
- c. An order that the Claimant be paid his salary and allowances.*
- d. Costs of this suit and interest from the date of filing till full payment.*

2. In the alternative:-

- a. Compensation to the Claimant for 12 months' salary together with allowances in damages together with interest from the date of filing until payment in full.*
- b. Costs of this suit and interest from the date of filing until payment in full.*

3. His basic salary at the time of filing this suit was Kshs. 717,925.00. It was his case that on 11th May 2017, he was issued with a show cause letter for alleged gross misconduct and given 7 days to respond.

4. It was also his case that the components of the letter indicated that he had been adversely mentioned in a forensic report for collusion to defraud, improperly awarding rebates or discounts, involvement in loss of key documents among other allegations, which report was adopted by the Board of Directors. He requested for a copy of the report but the same was ignored.

5. The Petitioner also filed a Notice of Motion Application dated 30th June 2017 seeking the following orders:

- a. Spent.*
- b. Pending the hearing and determination of this application the decision dated 11th May 2017 suspending the Claimant from performing his duties be stayed.*
- c. This Honourable Court do stay any action by the Respondent from withholding the Claimant's salary, allowances and remuneration pending the hearing and determination of the application.*
- d. This Honourable Court do stay any or further proceedings by the Respondent against the Respondent against the Claimant pending the hearing and determination of his application.*
- e. Cost of the application be provided for.*

6. The Application was based on the ground that his suspension was unlawful because the Respondent refused to issue the Petitioner with the Forensic Report which formed the basis of his suspension yet he had been issued with a notice to show cause why he should not be summarily be dismissed. In addition to this, the Respondent withheld his salary and allowances.

7. The Application was supported by the Petitioner's Supporting Affidavit sworn on 30th June 2017 and filed on even date, based on the grounds on the face of the Motion.

8. Pending the hearing of the Application, parties sought to settle the matter. On 25th April 2018, parties confirmed that the Respondent had paid the Petitioner what was owing to him but admitted that the issue of costs had not been settled. Parties were directed to file submissions on the matter.

9. Nevertheless, on 7th May 2018 the Petitioner, through the firm of Tom Ojienda & Associates Advocates, filed his Petition dated 30th April 2018 seeking the following prayers:-

- a. A declaration be issued that the purported illegal, unlawful and malicious termination of the Petitioner by the Respondent constituted a violation of the Petitioner's rights under Articles 27, 28, 35, 41, 47 and 50 of the Constitution.*
- b. A declaration that the Petitioner be compensated a total sum of KShs.15,000,000.00 or any other amount that the court deems sufficient and/or appropriate by the Respondent for the violation of the Petitioner's rights and fundamental freedoms under Articles 27, 28, 41, 47 and 50 of the Constitution.*
- c. A declaration that the board that purportedly approved the Claimant's termination was improperly and unconstitutionally constituted.*
- d. A declaration that the purported termination of the Petitioner's employment contained in the letter dated 13th July 2017 was unlawful, null and void.*
- e. An order directing the Respondent to unconditionally reinstate the Petitioner to his employment services and former position with the Respondent without any loss of benefits or seniority and without any conditionality.*
- f. An order for the Petitioner to be adequately compensated for lost time out of employment.*

g. In the alternative and without any prejudice to the foregoing, the Respondent be ordered to fully compensate the Petitioner for unfair, unlawful and wrongful termination of the employment services of the Petitioner with all attendant benefits equivalent to the gross salary and benefits for five (5) years thirty-six (60) months (sic) amounting to Kshs. 55,966,586.00 calculated as follows:-

1. Salary.....KShs. 43,075,500.00

2. Leave allowance.....KShs. 509,906.00

3. School fees for 3 children @ 75,000 p.a KShs.....1,050,000.00

4. Club subscription.....KShs. 300,000.00

5. Notice period (3 months).....KShs. 2.153,775.00

6. Gratuity @ 31%.....7,587,405.00

7. Outpatient medical cover.....KShs. 1,250,000.00

8. Inpatient medical cover.....KShs. 40,000.00

h. An order for issuance of certificate of service.

i. An order for issuance of letter of recommendation in line with HR Policy.

j. Any other or further relief as this Honourable Court may deem fit to grant.

k. Costs if this Petition.

10. The Petitioner avers that he was employed by the Respondent as the Head of Financial Management for a period of 5 years vide his appointment letter dated 27th September 2012. He was redeployed to the office of the Head of Internal Audit and Risk Management though the terms and conditions of his employment remained the same.

11. On 25th April 2017, the Petitioner applied to the Respondent for the renewal of his contract. The Managing Director (MD) of the Respondent informed the Petitioner the Board of Directors had resolved not to approve his request vide the letter dated 13th July 2017. It is the Petitioner's case that the letter did not specify when the Board met, he was not issued with minutes for the said meeting nor was he informed of the reasons for the decision.

12. It is the Petitioner's position that since all the members of the Board of Directors were male, it was improperly constituted contrary to the provisions of the constitution hence it was incapable of making legally binding decisions.

13. It is therefore his case that his employment was unfairly terminated 3 and a half months before the end of his contract without being given the reasons for his termination or a chance to present his case thus denying him the opportunity of having his employment contract renewed for another 5 years.

14. The Petitioner further avers that the premature termination of his employment is as a result of the strained relationship between him and the Managing Director who failed to involve the Board and that made the decision of not renewing the Petitioner's employment. It is his case that the Managing Director in-subordinated him on several occasions, for instance, the Managing Director transferred many experienced auditors without consulting him and refused to approve the Petitioner's departmental structure and internal audit work plan.

15. The Petitioner also avers that the Managing Director out rightly frustrated and undermined him. In particular, the Managing Director forced him to take compulsory leave on 8th November 2016 yet he had just resumed work after 3 weeks leave, refused to pay his subscription fees, had the Claimant's Safaricom tariff deactivated on 5th June 2017 and his Dell Computer recalled on 14th June 2017. The Petitioner avers that he was victimized by the Managing Director for personal reasons.

16. It is the Petitioner's case that his suspension on allegations that he was adversely mentioned in the forensic audit report constitute a witch hunt by the Managing Director.

17. It is the Petitioner's position that the actions by the Respondent constitute a violation of his rights under articles 27 (1), 28, 35 (1) (b), 41 (1), 47 (1) and (2) and article 50 (2) (a).

18. The Petition is supported by the Petitioner's Affidavit sworn on 30th April 2018 and is based on the grounds on the face of the Petition.

19. On 9th May 2018, the Respondent filed its submissions dated 9th May 2018 while the Claimant filed his even dated submissions on 18th May 2018, in support of their respective cases regarding the issue. On 26th September 2018, this Honourable Court delivered a Ruling finding that the Claimant was entitled to payment of costs either as agreed upon by parties or as taxed by the Deputy Registrar.

20. On 2nd July 2018, the Court directed ELRC Cause 1228 of 2017 to be consolidated with the Petition herein in view of the fact that the claim and Petition had not been substantially determined. The Respondent was subsequently directed to file its reply and the Petitioner his response.
21. On 7th December 2018, the Respondent filed its joint response to the petition and employment claim vide the affidavit of Janerose Karanja.
22. As regards the employment claim, the Respondent avers that the forensic audit was undertaken to shore up the Respondent's poor financial performance suspected to be due to misappropriation of company funds. Key personnel including the Petitioner were investigated, a report prepared and issued on the condition that it should not be disclosed without the external auditor's consent.
23. The findings of the report were that there were instances of potential criminal conduct by a number of personnel. Disciplinary action against the personnel adversely mentioned was recommended. The recommendation was adopted and investigations and disciplinary action were sanctioned.
24. The Petitioner was issued with a notice to show cause which set out the detailed particulars of the allegations and the Petitioner invited to respond to those allegations within 7 days, which he did. The notice also indicated that the Claimant would be invited to a disciplinary hearing where the Respondent would have responded to any request for particulars by the Petitioner without impeding other related investigations or disclosing reputationally damaging information. In view of this facts, the Respondent posits that the Petitioner's right to fair administration was not infringed upon.
25. The Respondent avers that the Petitioner's Petition ought to be dismissed because he was paid all his outstanding dues, he was accorded sufficient information to respond to the allegations made against him and there were legitimate grounds for withholding the report.
26. The Respondent urged this Honourable Court to dismiss the employment claim.
27. As regards the Petition, the Respondent avers that the Petitioner's redeployment from one department to another was a legitimate exercise of the Respondent's managerial prerogative under clause 6.10 of its Human Resource Policy Manual.
28. The Respondent contends that it had no obligation to renew the Petitioner's employment. Further, the decision not to renew his contract of employment was conveyed in a clear and ascertainable manner.
29. The Respondent further contends that given its shareholding, it is not a state corporation hence the appointment of its board is not subject to article 27 (8) of the Constitution and such there is no valid basis to challenge the veracity of its decisions.
30. It is the Respondent's case that the Petitioner's employment was not unfairly terminated as it was concluded by effluxion of time on 30th October 2017. However, the Respondent also avers that it took the decision not to have the Petitioner serve the balance of his contract. It is of the position that if the Petitioner legitimately believed that his contract had been unfairly terminated, he would not have filed the employment claim seeking a settlement of wages for the balance of his contract, which were duly settled.
31. The Respondent contends that the MD did not insubordinate the Petitioner nor act maliciously towards him as he was conveying the Board's decisions at all times. The Respondent avers that the reallocation of company assets was aimed at cost cutting and resource rationalization, which affected multiple departments and was not targeted at the Petitioner.
32. The Respondent further avers that it has not paid any subscription fees for any employees since 2016. As such the allegations by the Petitioner amount to unsubstantiated and unwarranted personal attacks.
33. The Respondent further contends that utilization of leave days had been problematic since 2014 hence the reason why employees were directed by the Board to comply with the HR Guidelines and further communication made to ensure that they utilized their leave days before the end of the financial year.
34. The Respondent avers that the Petitioner's averments concerning the issue amount to hearsay as it relates to announcements made in his absence. Further, the Petitioner's annexure marked EOA 20 clearly indicates that he was not mentioned.
35. The Respondent avers that there was no violation of articles 27 (1) and 41 of the Constitution because the Petitioner's suspension was provided for in the HR Manual and that his contract expired by effluxion of time.
36. The Respondent contends that the Petitioner has not provided a link between the provision of an office perk and his dignity and as such there was no violation of article 28. The Respondent further contends that articles 35 (1) and 47 (1) and (2) have not been violated as the Petitioner had no legitimate expectation to the renewal of his contract of employment.
37. The Respondent avers that article 50 (2) of the Constitution have not been violated because as the initiated disciplinary process was neither criminal or quasi-criminal in nature.
38. In conclusion, the Respondent avers that there is no basis for granting the reliefs sought and as such, the Petition should be dismissed.
39. The Petitioner filed a rejoinder vide the Petitioner's Supplementary Affidavit sworn on 5th January 2019. In his Affidavit he reiterates the contents of his Supporting Affidavit and avers that at the time of his suspension, 50% of his salary was being deducted.

40. He further avers that the Respondent's failure to issue him with Report was a clear indictment on the part of the Respondent. It is his position that the findings of the report were preliminary hence a negative recommendation ought not to have been issued. The Petitioner contends that the notice to show cause did not provide sufficient details as it contained the alleged findings and not how those findings were arrived at.

41. The Petitioner reasserts that the Respondent is a state corporation as defined under section 2 of the State Corporation Act. He contends that his right as provided under article 47 of the Constitution was violated by the Respondent's failure to provide him with the Board minutes.

42. The Petitioner avers that the MD's decision to suspend him was malicious since the Board's resolution was very clear that the management only undertakes disciplinary actions against employees below job group 5.

43. On 30th October 2018, the Respondent filed its Notice of Preliminary Objection dated 30th October 2018 regarding the Petition. The objection was raised based on the following grounds:-

1. The Petition constitutes an abuse of Court process as it discloses an alleged employment dispute the remedies for which were adequately provided for in statute and common law.

2. The Petition raises substantively similar grievances relating to the same subject matter, namely the erstwhile employment relationship between the parties based on similar facts to those in the employment cause.

3. The Petition and Employment Cause amount to use of two similar processes to vindicate the same rights.

4. The Petition constitutes a tariff of unsubstantiated charges targeted at the Respondent's Managing Director and the Respondent's lawful exercise of its managerial prerogative and is thus an abuse of court process.

5. The Petition and Employment Cause are both untenable as they are both predicated on the alleged violation of Article 47 of the Constitution.

44. Parties agreed to dispense with the Preliminary Objection and the Consolidated Cause by way of written submissions.

Submissions by the parties

45. On 5th February 2019, the firm of Were & Oonge filed the submissions dated 4th February 2019, regarding the employment claim. The Petitioner submits that he was never accorded a fair and honest chance to be heard in his defence. He was asked to show cause based on a report that could not be supplied to him. The Petitioner further submits that his employment was not terminated as his contract expired while his suspension was ongoing.

46. The Petitioner relies on the case of **Rebecca Ann Maina & 2 Others vs. Jomo Kenyatta University of Agriculture and Technology [2014] eKLR** where the court was of the opinion that an employee was entitled to documents in the possession of the employer, which would assist them in preparing their defence.

47. The employee is further entitled to call witnesses to buttress their defence. He also relies on the case of **Banking Insurance & Finance Union (Kenya) vs. Co-operative Bank of Kenya Limited [2015] eKLR** where the Court held that the employer must give reasons for the dismissal, which reasons must be valid and fair. The Court further held that the provisions of Section 41 of the Employment Act requires an employer to give an employee a fair and honest chance to be heard in his defence.

48. In conclusion, the Petitioner submits that he has proved his case on a balance of probability and that it is clear that the Respondent engaged in unfair labour practices.

49. On 30th November 2018, the Petitioner filed his written submissions dated 22 November 2018 regarding the Petition and the Respondent's Preliminary Objection.

50. The Petitioner submits that the Respondent's PO does not raise any point of law and lacks merit. He relies on the cases of **Mukisa Biscuit Manufacturing Company Limited vs. West End Distributors Limited [1969] EA 696 and Independent Electoral & Boundaries Commission vs. Jane Cheperenger & 2 Others [2015] eKLR**, which are to the effect that preliminary objections should raise issues of law, presuming all facts are undisputed.

51. The Petitioner submits that the Petition is rightfully before this Honourable Court, which has jurisdiction to determine the alleged constitutional violations, which violations have not been denied. He relies on the case of **United States International University vs. Attorney General [2012] eKLR** where it was held that the Industrial Court as constituted under the Industrial Court Act 2011, as a Court with the status of the High Court is competent to interpret the Constitution and enforce matters relating to breach of fundamental rights and freedoms in matters arising out of disputes falling within the provisions of Section 12 of the Industrial Court Act.

52. He also relies on the case of **Ernest Kevin Luchidio vs. Attorney General & 2 Others [2015] eKLR** where the Court cited with approval, the case of **Daniel N. Mugendi vs. Kenyatta University & 3 Others [2013] eKLR** to reiterate the holding in **United States International University vs. Attorney General [SUPRA]**.

53. The Petitioner submits that the Petition is not *sub judice* because the action in the Petition relates to the legality of the Petitioner's purported employment termination and the violation of his rights while the employment cause relates to the illegal suspension. Further, the Respondent had raised the issue severally and the same was out rightly dismissed and directions given.
54. The Petitioner submits that the ground that: "unsubstantiated claims against the Respondent's managing director and lawful exercise of managerial prerogative by the Respondent", does not raise any point of law.
55. As regards the Petition, the Petitioner submits that the highlighted incidences in paragraph 56 to 61 of the petition constitute the violations complained of if the purposive interpretation of the constitution was to be adopted and hence the declarations sought under prayer 1.
56. The Petitioner relies on the case of **Joseph Mbalu Mutava vs. Attorney General & Another [2014] eKLR** where it was held that the fundamental rights and freedoms are to be given a generous and purposive interpretation to realize the full benefit of the rights guaranteed.
57. He also relies on the case of **Robert K. Ayisi vs. Kenya Revenue Authority & Another [2018] eKLR** where the Court held that where a party has asserted and/or averred certain facts, which constitute a violation of the fundamental rights and freedoms, and the party against whom those claims of violations are deemed proven.
58. The Petitioner submits that Courts tend to award between Kshs. 1,500,000.00 and Kshs.2,500,000.00 for every violation of human rights and fundamental freedoms, and prays to be awarded the Kshs.15,000,000.00 as prayed. He relies on the case of **Otieno Mak'Onyango vs. Attorney General & Another [2012] eKLR** and **Robert K. Ayisi vs. Kenya Revenue Authority & Another [SUPRA]**.
59. The Petitioner submits that the Board constituting of male members was improperly and unconstitutionally constituted to render a legally binding decision. He relies on the case of **Marilyn Muthoni Kamuru & 2 Others vs. Attorney General & Another [2016] eKLR** where the Court declared a cabinet composed of 18 men and 5 women unconstitutional for failing to meet the required constitutional threshold.
60. The Petitioner submits that his employment was wrongfully, unlawfully and illegally terminated from his employment contrary to Sections 41, 43 and 45 (1) and (2) of the Employment Act 2007 and article 47 (2) of the Constitution. He relies on the case of **Mary Chemweno Kiptui vs. Kenya Pipeline Company Limited [2014] eKLR**, which elaborately set out the procedure for termination of an employment contract.
61. The Petitioner submits that he is entitled for an order of reinstatement because he had legitimately expected his contract to be renewed having served the Respondent diligently and faithfully. He relies on the case of **Mary Chemweno Kiptui vs. Kenya Pipeline Company Limited [2014]**.
62. He submits that in the alternative, he should be awarded damages for wrongful termination. It is his submissions that in fixed term contracts courts tend to award damages equivalent to the remainder of the contractual term of the employee.
63. Further, the board of directors was improperly and unconstitutionally constituted at the time of the alleged termination hence its decision was null and void and as such the Petitioner's contract is deemed as renewed. He relies on the case of **Gathoni Ngotho Kariuki vs. Presbyterian Church of East Africa and Presbyterian Foundation [2012] eKLR**.
64. The Petitioner further submits that he is entitled to statutory entitlements notwithstanding how he left his employment. He relies on the case of **Alphonse Maghanga Mwachanya vs. Operation 680 Limited [2013] eKLR** where it was held that there is a statutory obligation upon an employer to issue an employee with a certificate of service on separation despite the circumstances of the separation.
65. On 22nd January 2019, the Respondent filed its submissions relating to the preliminary objection and in support of its joint response to the Petition and Employment Claim.
66. The Respondent submits that filing a multiplicity of cases is in bad faith and an abuse of court process and the same should be struck out. The Respondent relies on the case of **Chudasama vs. Chudasama [2014] eKLR**, **Kiambu County Tenants Welfare Association vs. Attorney General & Another [2017] eKLR**, **GMV vs. Bank of Africa Kenya Limited [2013] eKLR** and **Jorim Owino Nyamor & Another vs. Kenya Airways Limited [2016] eKLR**.
67. The Respondent submits that the Petition as pleaded comprises of unsubstantiated personal gripes targeted at its MD and unfounded attacks at the Respondent's legitimate exercise of its managerial prerogative. Further, it fails to disclose a single credible constitutional issue and relies on the case of **East African Portland Cement Company Limited vs. The Attorney General & Another [2013] eKLR**.
68. It is the Respondent's submissions that it had the discretion of renewing or not renewing the Claimant's contract and that it was under the obligation to provide reasons for choosing not to renew a fixed term contract. It relies on the case of **Trocaire vs. Catherine Wambui Karuno [2018] eKLR**. Nevertheless, the Petitioner's contract ended by effluxion on 30th October 2017.
69. The Respondent also submits that it was under no obligation to provide the Petitioner with work and relies on the cases of **Alfred Nyungu Kimungui vs. Bomas of Kenya [2013] eKLR**, **W.C. Annandale vs. FEMCO Technology Holdings Limited JA 10/06** and **Turner vs. Sawdon [1901] 2 KB 653**.
70. The Respondent submits that invalidating the decisions of the Respondent's Board will have far reaching consequences to the Respondent which would be disproportionate to the mischief sought to be cured and relies on the case of **Michael Osundwa Sakwa vs. Chief Justice and President of the Supreme Court of Kenya & Another [2016] eKLR**.

71. It is the Respondent's submissions that the Petitioner's rights and fundamental freedoms were not violated.

72. In conclusion, the Respondent submits that the Petitioner is not entitled to any of the prayers sought.

73. On 6th February 2019, the Petitioner filed supplementary submissions dated 5th February 2019, regarding the petition. The submissions therein reiterate the contents of his submissions dated 22nd November 2018. The Petitioner relies on the case of **Mark Ole Karbolo & 4 Others vs. Acting Minister Ministry of Industrialization & Another [2012] eKLR** where it was held that the Respondent was a state corporation. This case reinforces its submissions that the Respondent is indeed a State Corporation.

74. I have examined all the averments and submissions before me. The issues for this Court's determination are as follows:-

1. Whether the decision not to review the Petitioner's contract of employment was based on valid reasons and whether due process was followed.

2. Whether the decision to terminate the Petitioner's contract early was based on valid reasons and due process.

3. Whether the matters raised in the claim were fully settled and whether the Petitioner is entitled to remedies sought.

75. On the 1st issue herein, the Petitioner has submitted before this Court that the Board that sat to review his contract renewal was improperly constituted because there was gender imbalance.

76. He also submitted that the reasons that led to the non-renewal of the contract were not brought to his attention as the report that allegedly adversely mentioned to him was never brought to his attention.

77. The Petitioner APP EOA-1 is the Petitioner's appointment letter as Head of Finance Management (Job Grade 2). The letter is dated 27/9/2012 and it was indicated that the Petitioner had been appointed to a five year contract under Clause 4.

"Renewal of Appointment

The parties to this contract may renew the contract on terms and conditions to be agreed in writing. Should you wish to be reappointed in the same position, you will be required to make a written request at least (6) months before the expiry date of this contract".

78. The Petitioner signed this contract on 28/9/2012 and the contract was effective 1/11/2012. The expiry date was therefore 30/10/2017. Vide a letter dated 25/4/2017 the Petitioner applied for renewal of this contract and so he complied with the conditions in the contract for renewal if he so wished.

79. Vide a letter dated 13.7.2017, he was notified that the contract was not going to be renewed and he was terminated with effect from 14.7.2017. This was 3½ months before the expected date of termination of the contract. No reasons were given for the early termination of the contract though.

80. The Respondent's Managing Director also indicated that Board had made the said decision. The Minutes that determined The Petitioner's employment were not presented to Court and neither was the Petitioner invited before the said Board to answer to the reasons as to why his contract was being terminated before its expiry date.

81. The Petitioner averred that he expected his contract renewed but his valid legitimate expectation was frustrated. From the contract document, renewal was subject to both parties agreeing to it. The renewal was not however mandatory. The Respondent as an employer have their prerogative to either renew or not renew the contract based on their needs and therefore they cannot be faulted for not renewing the contract or not or whether they had a valid reason or not.

82. On the second issue, Respondent the Respondent terminated the Petitioner's valid contract before its renewal date. They subjected the Petitioner to a termination without due process as expected under Section 41 of Employment Act. This was also in breach of the express provisions of Article 47 of the Constitution which provide as follows:-

1) "Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall:-

a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

b) promote efficient administration

83. Section 4 (1), (2), (3) and (4) of the Fair Administrative Action Act also states as follows:-

- 1) "Every persons has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
- 2) Every person has the right to be given written reasons for any administrative action that is taken against him.
- 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.
- 4) The administrator shall accord the person against whom administrative action is taken an opportunity to:-
 - a) attend proceedings, in person or in the company of an expert of his choice;
 - b) be heard;
 - c) cross-examine persons who give adverse evidence against him; and
 - d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

84. The Petitioner was neither informed of the reasons for his termination nor given an opportunity to defend himself as indicated above. It is therefore correct to state that he was condemned unheard and therefore his right under the constitution and the law were trampled upon.

85. The Respondent avers that the decision was based on an audit report implicating the Petitioner for wrongdoing. The said report was never supplied to the Petitioner and the Petitioner had no opportunity to interrogate its contents before the termination neither was the Petitioner given an opportunity to defend himself on the said allegations.

86. I therefore find that the decision to terminate the Petitioner's contract 3 ½ months earlier was unfair and unjustified.

87. On the last issue, the Respondent have submitted that these issues were fully settled in the Claim No. 1228/2017. In this Claim, the Parties reached a consent not to proceed with the Claim as the Claimant/Petitioner herein had been paid the remainder of his contract period. That does not however compensate him for the unfairness meted against him.

88. It is therefore my finding that in order to compensate him for the unfair termination of the contract, he is entitled to payment of 4 months' salary. I believe this would adequately compensate him and this translates to = $4 \times 513,962.50 = 2,055,850/=$

89. I also award Petitioner 1 month salary in lieu of notice = 512,962.50.

90. In addition, I also award Petitioner damages equivalent to 2 million for the breach of his constitutional rights.

Total awarded = 4,569,812.50

Less statutory deductions

Dated and delivered in open Court this 6th day of March, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Makokha for Petitioner – Present

Muriingi for Claimant in Claim 1228/18

Mutto for Respondent