



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE 153 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 25th October, 2019)

DR. JOHN MURIITHI.....1ST CLAIMANT
 JACKSON AWUOR.....2ND CLAIMANT
 JOICE ONYANGO.....3RD CLAIMANT
 JUDY OBURA.....4TH CLAIMANT

VERSUS

THE REGISTERED TRUSTEES OF THE SISTERS OF
 MERCY (KENYA) T/A “THE MATER MISERICORDIA HOSPITAL”RESPONDENT

CONSOLIDATED WITH CAUSE CAUSE 212 OF 2015

JAMES MUTISO KALOKI.....1ST CLAIMANT
 SUSAN KAGENDO KARANJA.....2ND CLAIMANT
 JACKSON NGUNJIRI GATHOGO.....3RD CLAIMANT
 ALICE WAMBUI NJAMBI.....4TH CLAIMANT

VERSUS

THE REGISTERED TRUSTEES OF THE SISTERS OF
 MERCY (KENYA) T/A “THE MATER MISERICORDIA HOSPITAL”RESPONDENT

CONSOLIDATED WITH CAUSE CAUSE 241 OF 2015

LAWRENCE GICAGA MUIGA.....CLAIMANT

VERSUS

THE REGISTERED TRUSTEES OF THE SISTERS OF
 MERCY (KENYA) T/A “THE MATER MISERICORDIA HOSPITAL”RESPONDENT

JUDGMENT

1. The Claimants herein were employed by the Respondent on diverse dates and held various senior managerial positions. In July 2014, the Respondent undertook a Forensic Audit conducted by Jane Wambui Mugo that lasted for over 7 months, which was aimed at establishing the extent and magnitude of corrupt or fraudulent misappropriation of funds at the hospital.
2. The Respondent avers that in accordance with the findings of the Confidential Forensic Audit Report, it suspended the Claimants on 5th February 2015 and served each of them with the specific charges against them which they were expected to respond to.
3. The Claimants on their part aver that they were never furnished with a copy of the Forensic Audit Report and other documents to enable them respond the following day, to the allegations made against them. In respect of this, the Respondent avers that the Audit report was not required to respond to the charges and that the Claimants were not entitled to be given copies of the Confidential Forensic report for purposes of their responses or show causes.
4. They further aver that they were neither invited to a disciplinary hearing nor issued with reasons for their summarily dismissal or a summary dismissal letter.
5. The Respondent avers that the Claimants were suspended in order to facilitate the finalisation of the disciplinary cases against them. It further avers that it was vested with the managerial prerogative to initiate disciplinary proceedings or terminate the Claimants for just cause.
6. The Respondent further avers that after the delivery of the Ruling dated 10th June 2015, the Claimants did not disclose to the Court their own employment status thus they continued receiving half salary from the Respondent and ought to be disentitled from retaining half salary, pension and NSSF contributions as they failed to comply with Order (e) which required them to go through a pre-trial directions within 60 days on hearing of the main claim.
7. The Claimants filed separate suits against the Respondent being Cause 153 of 2014, Cause 212 of 2014 and Cause 214 of 2015, which were all consolidated in Cause 153 of 2018.

Cause 153 of 2015

8. The 1st Claimant held the position of Chief Executive Officer at the Respondent on 3 year contract from 2nd October 2008 which was subsequently extended to 31st May 2016. He testified as CW9 and seeks the following reliefs in his Amended Statement of Claim filed on 19th January 2018:-

a) The declaration that the purported suspension and subsequent termination of the 1st Claimant without affording him an opportunity to be heard and without giving him fair, concrete and substantiated reasons as well as in a very humiliating manner whisking him out of his offices smacks of impropriety, manifest injustice, arbitrariness, illegality, unreasonableness and the same is ins blatant disregard of the rules of natural justice as well as the constitutional principles of a fair and just administrative process.

b) Kshs. 13,320,000 being gratuity, unpaid leave and half salary to the end of the contract.

c) Loss of earnings suffered by the 1st claimant as a result of the unfair termination.

d) Aggravated damages for inhuman, disrespectful and degrading treatment towards the 1st Claimant.

e) General damages for unlawful termination.

f) Costs of this suit.

g) Interest on (b) above at Court rates.

h) Any other relief that this Honourable Court may deem just and expedient in the circumstances hereof.

9. In response to his Amended Statement of Claim, the Respondent filed its Further Amended Statement of Response and Counter-Claim on 6th February 2018. The Respondent in its counter claim seeks following reliefs against the 1st Claimant:-

a) Payment in restitution of the sum of Kshs. 10,326,313.85 in half-salary monthly payments to the 1st Claimant, pension and NSSF Contributions.

b) In the alternative, the sums in half salary monthly payments, pension and NSSF contributions, be set off against any sums in compensation found payable under Section 49 of the Employment Act 2007 and any over-payment balance be re-funded to the Respondent.

c) Interest on (a) and (b) at Court rates.

d) Any other relief that this Court may deem just or expedient.

10. The Claimant did not file a response to the Further Amended Statement of Response and Counter-Claim but filed a Reply to the Respondent's Statement of Response on 5th June 2017.

11. He avers that the Respondent acted improperly, irrationally and illegally in finalising his disciplinary case considering he was not informed of the evidence the Respondent intended to rely on.

12. In respect of the Counter-claim, he denies being guilty of unjust enrichment and avers that the payments made to him were pursuant to the order issued by the Court.

13. The 2nd 3rd and 4th Claimants held the position of Credit Manager, Financial Controller and Finance Manager. They testified as CW3, CW2 and CW4 respectively. They seek the following orders in their Amended Statement of Claim filed on 23rd June 2017:-

1. 2nd Claimant

a. Kshs. 272,985 being the default interest and/or penalties levied by Standard Chartered Bank on a loan taken by the 2nd Claimant and guaranteed by the Respondent as a result of the Respondent's unlawful actions.

b. Loss of earnings suffered by the 2nd Claimant as a result of the Respondent's action.

c. Kshs. 1,982,128 being severance pay for 16 years worked at the Respondent Hospital.

d. Kshs. 743, 298 being 3 months' salary in lieu of notice.

e. Kshs. 545,085 being unpaid annual leave for 2014-2017 worked.

f. Kshs. 3,097,075 being the 2nd Claimant's half unpaid salary during the time he was unlawfully suspended from February 2013 until the time he was unlawfully terminated in March 2017.

g. 12 months' salary as compensation for unfair termination amounting to Kshs. 2,973,192.

h. General damages for defamation.

i. Aggravated damages for inhuman, cruel, harsh and degrading treatment meted out on the 2nd Claimant.

j. Interest on 1a-i above at Court rates until payment in full.

2. 3rd Claimant

a. Kshs. 458,973.10 being the default interest and/or penalties levied by Standard Chartered Bank on a loan taken by the 3rd Claimant and guaranteed by the Respondent as a result of the Respondent's unlawful actions.

b. Loss of earnings suffered by the Claimant as a result of the Respondent's action , wherein the 3rd Claimant was not earning any income as opposed to Kshs. 710,882 per month.

c. Kshs. 8,886,025 being the 3rd Claimant's half unpaid salary during the time she was unlawfully suspended from February 2013 until the time she was unlawfully terminated in March 2017.

d. Kshs. 4,265,292 being severance pay for 12 years employment worked for the Respondent Hospital.

e. Kshs. 2,132,646 being 3 month's salary in lieu of notice.

f. Kshs. 1,042,626 being unpaid annual leave for 2014 -2017 worked.

g. 12 months salary as compensation for unfair termination amounting to Kshs. 8,530,584.

h. General damages for defamation.

i. Aggravated damages for inhuman, cruel, harsh and degrading treatment meted out on the 3rd Claimant.

j. Interest on 2a-i above at Court rates until payment in full.

3. 4th Claimant

a. Kshs. 164,637 being default interest and/or penalties levied by Standard Chartered Bank on a loan taken by the 4th Claimant and guaranteed by the Respondent as a result of the Respondent's unlawful actions.

b. Loss of earnings suffered by the 4th Claimant as a result of the Respondent's action.

c. Kshs. 3,102,194 being severance pay for 17 years of employment worked for the Respondent hospital.

d. Kshs. 4,562,050 being the 4th Claimant's half unpaid salary during the time she was unlawfully suspended from February 2013 until the time she was unlawfully terminated in March 2017.

e. Kshs. 1,094,892 being 3 months' salary in lieu of notice.

f. Kshs. 802,920 being unpaid annual leave for 2014-2017 worked.

g. 12 months' salary as compensation for unfair termination amounting to Kshs. 4,379,568.

h. General damages for defamation.

i. Aggravated damages for inhuman, cruel, harsh and degrading treatment meted out on the 4th Claimant.

j. Interest on 3a-i above at Court rates until payment in full.

4. A declaration that the purported suspension and subsequent termination of the 2nd, 3rd and 4th Claimants without affording them an opportunity to be heard and without giving them concrete and substantiated reasons as well as in a very humiliating manner whisking them out of their offices smacks of impropriety, manifest injustice, arbitrariness, illegality, unreasonableness and the same is in blatant disregard of the rules of natural justice as well as the constitutional principles of a fair and just administrative process.

5. An order does issue restraining the Respondent whether acting by itself, its trustees, agents, officers, guards and/or whosoever from suspending, terminating, locking out from their respective offices and/or interfering with the salaries and/or benefits attendant to the Claimants and/or from taking any other adverse action against the Claimants without following the due process as stipulated in the Employment Act, the respect contracts of service, Mater Hospital Employee Manual and the constitution of Kenya.

6. Costs of this suit for each of the 2nd, 3rd and 4th Claimants.

7. Any other relief that this Honourable Court may deem just and expedient in the circumstance hereof.

14. The Respondent filed its Further Amended Statement of Response and Counter-Claim to the Amended Statement of Claim, on 6th February 2018. In its Counter-claim, the Respondent seeks the following reliefs against the 3 Claimants:-

a. **Payment in restitution of the sum of Kshs. 16,521,017.35 in half-salary monthly payments to the 3 Claimants, pension and NSSF contributions.**

b. **In the alternative, the sums in half salary monthly payments to the 3 Claimants, pension and NSSF contributions be set-off against any sums in compensation found payable under Section 49 of the Employment Act 2007 and any over-payment balance be refunded to the Respondent.**

c. **Interest on (a) or (b) at Court rates.**

d. **Any other relief that this Court may deem just and expedient.**

15. The 2nd and 4th Claimants did not file a reply to the Further Amended Statement of Response and Counter-claim.

Cause 212 of 2015 and Cause 214 of 2015

16. The Claimants in Cause 212 of 2015 held the positions of Procurement & Supply Chain Manager, Cashier, Projects and Maintenance Manager and Revenue Accountant respectively. They testified as CW9, CW6, CW8 and CW7 respectively. They seek the following reliefs in their Memorandum of Claim filed on 18th February 2018:-

a. **Damages for unlawful termination and breach of the Claimant's constitutional rights under the Constitution.**

b. **Reinstatement.**

c. **Any other relief that this Honourable Court may deem fit to grant in the circumstances.**

d. Costs of the Claim.

17. The Claimant in Cause 214 of 2015 held position of Head of Marketing/Marketing Director on a 4 year contract from 1st May 2008. He testified as CW10. He seeks the following reliefs in his Memorandum of Claim filed on 25th February 2015:-

a. Damages for unlawful termination and breach of the Claimant's constitutional rights under the Constitution.

b. Reinstatement of the Claimant.

c. Payment of commissions of 2.5% per annum since 1st May 2009 to 31st December 2009.

d. Any other relief that this Honourable Court may deem fit to grant in the circumstances.

e. Costs of the Claim.

18. The Respondent filed a joint Amended Statement of Response in both Causes 212 and 214 on 8th June 2017. In its counter-claim, the Respondent seeks the following reliefs:-

a. Payment in restitution of the sum of Kshs. 18,515,951.64 in half salaries monthly payments, pension and NSSF contributions.

b. In the alternative, the sums in half salaries monthly payments to the Claimants, pension and NSSF contributions, be set off against any compensation found due to them under Section 49 of the Employment Act, 2007 and any over-payment balance be re-funded to the Respondent.

c. Interest on (a) or (b) at Court rates.

d. Any other relief that this Court may deem just or expedient.

19. The Claimants filed a Reply to the Amended Statement of Response and Counter-claim on 5th June 2017 in which they denied the allegations in the Amended Statement of Response and Counter-claim.

Claimants' case

20. Joyce Grace Onyango, **CW1**, adopted her Witness Statement dated 23rd June 2017 and filed on 11th July 2017 as her evidence in chief.

21. CW1 testified that she has worked in finance and audit for close to 30 years and has never been accused of any impropriety. She averred that issues with the Respondent began in 2013 when new trustees were appointed during which time the mode of working changed and the governance process was ignored.

22. She testified that an audit was carried out in 2013 and that the Respondent's management had raised an issue on a clearing account balance which they undertook to look into. She testified that she informed the Senior Financial Accountant to look into it and report to her.

23. She testified that the Senior Financial Accountant started the process of reconciling the account and found out that monies were not banked. She testified that she then informed the Chief Executive Officer (CEO) and the new trustees ordered for the forensic audit.

24. It was her testimony that the forensic audit was conducted by an individual who never had a letter indicating the scope of work and that work was delayed for 2 weeks before the audit started. She testified that the auditor asked the Human Resource for personal files of 7 persons out of the 9 who ended up being dismissed.

25. She contended that on 5th February 2015, she reported to work at 6am and that on that day the security guards had changed from G4s to KK guards. She testified that 3 guards, 3 trustees and the Senior Financial Accountant went into her office and served her with a suspension letter. She testified that was expected to show cause by 12 noon the following day why she should not be dismissed.

26. She averred that she did not show cause for reason that the 10 accusations made against her were vague. She testified that she had 30 hours and she did not have any documents to enable her reply to the accusations. However, she instructed her advocates to respond on her behalf.

27. She testified that on 8th January 2015 she received a text message from the Head of Trustees, Anne Itotia, who asked her to pick the Respondent's response on the matter. She contended that she had previously declined to sign a Schedule of unbanked amounts which the Forensic Auditor has sent the Financial Accountant and one of the trustees had asked her to sign.

28. She testified that she did not receive a dismissal letter but was informed that it was sent through registered post. She contended that she was never given a chance to defend herself before her dismissal. She contended that after they left employment, the Respondent wrote to their banks informing them of their dismissal.

29. In cross-examination, she testified that the figures for the year 2008 to 2014 were supported by some documentary evidence that was

produced in Court but she did not have the documents for the years 2008 and 2009. She testified that she did not have a report of her investigations as it was in the hospital's documents and that she did not request for the production of these documents.

30. She testified that the issue of the cash clearing not being properly reconciled would have been detected by a person with due diligence. She testified that the senior financial accountant was the person supervising the people doing the reconciliation.

31. She contended that she was not aware if the management reported the misappropriation of 12 million was reported to the police. She further contended that the auditor came up with an estimated amount of 300 million in contrast to her amount of 14 million.

32. She denied refusing to provide the CEO with soft copies of 2010, 2011 and 2012 bank statements. She further denied interfering with the forensic audit by controlling access to financial documents, information and IT data. She further denied having leaked the findings of the forensic audit and causing a crisis at the hospital with other senior executives.

33. She contended that she did not know if the situation of suspending 9 senior executives created a volatile situation at the hospital as she had left. She contended that she was defamed by the hospital in a Sunday Nation publication.

34. She testified that pursuant to Clause 3.5 of the Respondent's Employee Handbook she had not produced any document showing that she was allowed to carry forward her leave. She further testified that from February 2015 to January 2017 she was paid by the Respondent pursuant to a Court Order.

35. In re-examination, she testified that the qualified opinion had nothing to do with misappropriation of monies. She further testified that the Financial Manager and Senior Accountant who worked under her never informed her of any misappropriation and it was them that were to raise the flag on the issue. She further testified that she recorded a statement with the DCI but the DCI only charged the cashier.

36. Judy Obura, **CW2**, adopted her Witness Statement dated 23rd June 2017 as her evidence in chief. She testified that the Respondent did not follow procedure in terminating her employment. She further testified that in the beginning of February 2015, she was suspended from work and issued with a show cause letter which she was to respond to by 3pm, the following day. She testified that she did not have sufficient time to respond and that the allegations therein were not clear.

37. In cross-examination, CW2 testified that at the time of her dismissal she was the Finance Manager and not the IT Manager. She testified that CW1 was her immediate supervisor. She further testified that they did not treat Anne Itotia with hostility and that senior managers did not brief, Anne Itotia, of the operational programmes as she, CW2, was not interrelating with her.

38. She stated that she was aware of a forensic audit that commenced in July 2014 but denied obstructing the forensic audit. She further denied leaking the audit information and causing a managerial crisis. She contended that she was not suspended on reasonable grounds, was not given the details of her suspension and was never given a hearing.

39. She testified that she filed an application on 9th February 2015 but she did not seek to frustrate the disciplinary process and that she did obtain the orders sought in the application. She confirmed that the Respondent had produced a summary dismissal letter and certificates of posting of some documents dated 9th February 2015 and 10th February 2015.

40. She contended that her reputation has been severely affected as she has attended interviews where parties have heard the negative reputation against her. She testified that the publication in the Nation newspaper was not the only evidence to show the injury on her reputation. She confirmed that she has since secured alternative employment as a Finance Director where she has worked for the last 14 months.

41. She testified that from February 2015 to 31st January 2017 she had been receiving half pay from the Respondent based on the Court Order. She testified that she did not inform the Court that she had secured alternative employment on 1st January 2016 as this was the first time she was giving evidence.

42. She testified that she was forcefully ejected from office thus she could not produce documents to show approval for extension of leave days and that she did not request her advocate to have these documents produced by the Respondent. She testified that the Respondent has since filed a case against them, HCCC No. 267/2018.

43. In re-examination, she testified that the audit report, which was the basis of her suspension, was never availed to her. She testified that the letter from her advocates had sought specific details on the particulars to enable her respond to the allegations. She testified she was not subjected to a disciplinary hearing before her dismissal. She contended she was not the person responsible for the audit report.

44. Jackson Odera Awuor, **CW3**, adopted his witness statement dated 23rd June 2017 and filed on 11th July 2017 as his evidence in chief.

45. In cross-examination, CW3 testified that though he had stated in his Witness Statement that he had been escorted by KK guards he did not indicate that he was harassed. He testified that his testimony on forensic audit is a matter of his personal opinion. He contended that the Respondent has the authority to conduct a forensic audit but for good practice they should consult management.

46. He testified that the audit report was ongoing thus his termination was based on incomplete findings. He further testified that he was defamed due to the fact that he was bundled out. He testified that he did not produce any documents to show that he had requested for leave and was denied. He testified that the hospital produced a summary dismissal letter dated 9th February 2015. He further testified that he did not inform the Court that he had secured employment on 1st October 2015.

47. In re-examination, he testified that he was on leave and was called back to work. He contended that he had never seen the forensic audit report that was the reason for his dismissal. He further testified that the Respondent wrote to his new employer and informed it of his dismissal. He contended that he has received salary from his new employer on the understanding that he was receiving half pay from the Respondent.
48. John Kamau Muriithi, **CW4**, adopted his witness statement dated 21st January 2019 and filed on 23rd January 2019. He stated that he had worked for the Respondent from February 2008 to February 2015 when he was suspended.
49. In cross-examination, CW4 contended that PKF had raised issue of the bank balance of 7 million, which was in the cash clearing account that was brought forward in 2012 and was unsupported. He contended that in early 2014, the management carried out an investigation of cash receipts and deposits covering 2009 to 2011 that disclosed the misappropriation of 12.2 Million. He contended that it is not true that this is what triggered a forensic audit by the Respondent.
50. He testified as the CEO he was charged with day to day management of the hospital and that he had knowledge of the commission of the forensic audit but was not consulted at any stage. It was his testimony that he did not obstruct the forensic audit and at one stage he asked the forensic auditor not to request documents from staff but from him. He further testified that he did not refuse to supply the Respondent's bank statements as they were in custody of the bank and Governing Council.
51. He denied being in collusion with the Chairman of the Governing Council and other senior managers to access the leaked forensic audit report in order to create an emergency managerial situation at the hospital. He contended that he was a member of the Finance Committee of the Governing Council and that they did not compromise the financial affairs of the Respondent.
52. He averred that his summary dismissal letter was sent to him but he received it many months later. He averred that though he was dismissed for gross misconduct he never committed any gross misconduct and he did not perform his duties negligently.
53. He averred that his contract with the Respondent was to expire on 31st May 2016. However, from 3/9/2015, he was appointed as the Deputy Vice Chancellor of Finance and Administration of Riara University on a two year fixed contract. He averred he still works at the University and that he had informed his advocates to advise the hospital on his new employment. He testified that he continued to receive salary from the Respondent from February 2015 to 31st January 2017 when he was not serving the Respondent.
54. He testified that he wrote to Court when he got an appointment at the University and the hospital's counsel had sought to have the order varied. He testified that he has been sued at the Anti-Corruption Court in Case 3 of 2018 and Cause 2 of 2018. Further, that he has been sued together with CW1 in HCCC 267 of 2018.
55. In re-examination, he contended that his suspension letter was on grounds that there was breach of fiduciary duty based on the forensic audit. He contended that neither him nor his advocate was supplied with a copy of the forensic audit. He contended he did not refuse to provide any CFC bank statements. He contended he was never issued with any warning letter before the dismissal. He further contended that while working for the Respondent he also taught at Strathmore University.
56. Gregory Otieno Agolla, **CW5**, adopted his witness statement dated 30th June 2016 filed on 14th July 2017.
57. In cross-examination, CW5 testified that he resigned from the Respondent in December 2014. He contended he did not leave to avoid the forensic audit targeting his office. He further contended that he was not privy to investigations being undertaken by the Hospital.
58. He averred that the personal files requested for by the Forensic Auditor were for senior managerial executives. According to him, the request was bizarre for reason that if the auditors wanted job descriptions they should have asked for them. He testified that he was fully paid and did not have any claim against his former employer.
59. Susan Kagendo Karanja, **CW6**, adopted her Witness Statement filed on 23rd January 2019 filed on even day as her evidence in chief.
60. CW6 testified that the audit was not complete as she had never seen the report. She contended that she was given her summary dismissal but did not meet the trustees. She testified that her supervisor did not indicate forensic audit findings that related to her.
61. She testified that she learnt of the loss of 12 million as stated in the forensic audit through a letter. She further testified that pursuant to the Court Order, she received Kshs. 1,370,870 for the period between February 2015 to 1st January 2017. She testified that the Respondent has since charged her in Anti-Corruption Court Case No. 3 of 2018.
62. In re-examination, she contended that she collected the summary dismissal letter but was not invited to any disciplinary hearing. She contended that the reasons for her dismissal were never given and that the termination letter was issued in 2017 after she filed the instant suit. She contended that she did respond to the letter but her response was not considered. She further contended that she was not informed of contents of the audit report.
63. Alice Wambui Njambi, **CW7**, adopted her Witness Statement filed on 23rd January 2019 as her evidence in chief.
64. CW7 testified that at the time she was served with the show cause letter, the forensic audit had not been completed. She contended that she met only one trustee who issued her with a dismissal letter dated 9th February 2015.

65. She contended that the broad issues of the forensic audit were not specified in her show cause letter and that she did not know the outcome of the audit. She testified that she received Kshs. 2,188,114.60 from February 2015 to 31st January 2017 pursuant to the Court Order.
66. In re-examination, she maintained that she received her termination letter after she had filed the instant suit. She maintained that she was not invited to a disciplinary hearing.
67. Jackson Ngunjiri Gathogo, **CW8**, testified that he worked for the Respondent from December 2011 to February 2015.
68. He testified that one of his duties was to implement construction projects and that the Hospital had qualified consultants who would liaise with his department in carrying out their work. He testified that his suspension letter listed 4 grounds of suspension which according to him were general accusations as no projects were mentioned.
69. He testified that he replied to the accusations enquiring the details of the projects in questions. It was his testimony that the Respondent did not give him the requested details and did not respond. He testified that he received a call from Sr. Itotia who informed him to collect some document which was the dismissal letter dated 9th February 2015.
70. He contended that the financial loss was not indicated and that he was never given a copy of the forensic audit report. He contended that he had written a resignation letter dated 30th January 2015 but never received a response to it.
71. In cross-examination, he contended he was aware of the forensic audit that was commissioned in July 2014. He contended that he did not understand why disciplinary action was to be taken against him in view of his resignation notice.
72. He contended that he was escorted to his office and out of the office but he had not indicated that he was oppressed by the guards. He denied neglecting his work or performing his work carelessly. He further denied being employed as an executive Director by Shenzen Solutions Limited in 2015.
73. In re-examination, he testified that the resignation letter dated 30th January 2015 had not been accepted by 5th February 2015 when he was being suspended and 9th February 2015 when he was summarily dismissed.
74. James Kaloki, **CW9**, adopted his witness statement dated 23rd January 2019 as his evidence in chief.
75. CW9 testified that they were summoned to the boardroom and informed to hand over to other employees. He testified that he was given one day to respond and he did respond the following day.
76. He testified that in his response he requested more details to enable him respond appropriately but he thereafter received his letter of termination. He testified that to date he has never received any reason for his termination and that he was not paid any dues before his termination.
77. In cross-examination, he testified that he there was an error in paragraph 6 of his Witness Statement however, all that he stated in the statement was true. He contended that the DCI summoned him to explain the alleged losses and that though he recorded a statement, the DCI did not issue him with a copy of the forensic audit report.
78. He contended that he never opposed the carrying out of the forensic audit and he never got access to the leaked information or the outcome of the forensic audit report. He testified that he never neglected and improperly performed his work and that he was not given a reason for his dismissal in the summary dismissal letter.
79. He testified that he had received Kshs. 5,567,996.25 pursuant to the Court Order. He further testified that the respondent had sued him in relation to the Hospital's Cafeteria.
80. In re-examination, he clarified that he has not been charged in any criminal or anti-corruption matter. He maintained that he was not given any hearing before his dismissal.
81. Lawrence Muigai, **CW10**, adopted his Witness Statement dated 23rd January 2019 as his evidence in chief.
82. In cross-examination, he testified that the Respondent owes him Kshs. 15 Million as commissions. He testified that he seeks 2.5% commission but he did not produce any evidence of the Respondent's revenue growth.
83. He testified that he was employed in 2009 and his contract was renewed on 1st May 2012 for 3 years. He contended that the renewed contract did not have a provision for 2.5% commission. He testified that he did not demand payment of the unpaid commissions when the 1st contract expired in March 2012.
84. He stated that there a typo on paragraphs 6 and 7 of his Witness Statement as he was suspended on 5th February 2015 and not 6th February 2015. He testified that he did not oppose the carrying out of the forensic audit and did not cause a crisis at the Respondent's premises. He denied being negligent in performing his duties.

85. He contended that at the date of his summary dismissal on 9th February 2015, he had only 3 months to the expiry of his contract but he had received a letter from the Human Resource stating that the contract would be renewed. He however testified that he did not produce the letter in Court.

86. He contended that he did not inform the Court that his fixed term had expired and thus he continued to receive salary to the amount of Kshs. 5,774,21,50 over the period 2015 to January 2017 pursuant to the Court Order.

87. In re-examination, he maintained that he was not paid his commissions with regard to the 1st contract despite his contract expressly providing for the payment of the commissions. He stated that there was no complaint about his service and that he was given commendation for his good service. He further contended that he never led the any financial loss due to his negligence.

88. He contended that he is not aware of any financial statement filed by the Respondent which shows revenue loss. He further stated he was not shown the misadvice that he was alleged to have given neither was it produced in Court. He stated that the complaint made to the DCI on the misadvice was not factual and that the DCI has not taken any action against him.

Respondent's case

89. Sr. Anne Itotia, RW1, stated that she is a Sister of Mercy and had been the Head of Trustees of Sisters of Mercy from December 2012 to June 2015 but was now handing over to new Trustees. RW1 adopted her Witness Statement filed on dated 21st January 2019 and filed on 22nd January 2019 as her evidence in chief and made several oral amendments to her Witness Statement.

90. In cross-examination, by counsel for the 2nd to 4th Claimants in Cause 153 of 2015, she testified that a vote of no confidence was raised against her leadership but that was not the order of conducting business. She testified that she did not supply the Claimants' advocates with the documents sought which would have enabled them respond to the allegations. She further stated that up to date the forensic audit report relied upon was never supplied.

91. She testified that the Employee Handbook had a procedure to be followed prior to termination, which included verbal warning and written warnings however there were no such warnings. She contended that she decided to terminate the Claimants on 7th February 2015 and that there was a meeting when the decision as made.

92. She testified that though she stated that SMSs were sent to the Claimants, they called the Claimants to give them the way forward on the hearing. She testified that in the meeting held on 7th February 2015 they did not consider the Claimants' request as the time given was 24 hours. She maintained that she had not given the Claimants a copy of the audit report.

93. She confirmed having dissolved the Governing Council but this was not aimed at having no opposition to her decisions. She confirmed that they hired KK Security Guards to escort Claimants out of the premises.

94. She testified that they gave the forensic report to the DCI but the DCI has not informed the Claimants of the outcome of their investigations though one person Duran Ligaga has since been charged with stealing 12.2 million. According to her, the Claimants stole Kshs. 600 million.

95. She testified that the Claimants in this case have not been charged with any criminal offence relating to this case. She further testified that that she was not aware that CW1 is a witness against Duran and that it was the first time she was seeing the case against Duran.

96. According to her, she did not refuse to issue the Forensic Auditor Jane Mugo, with documents. She contended that the Auditor was never known to her and that there was no tender to hire the Forensic Auditor.

97. She contended that by asking for the Claimants' personal files, the Auditor wanted to know their roles. She confirmed that the Claimants had secured loans but stated that the bank had no role in their employment. According to her, the letters to the banks were not malicious but just standard practice.

98. Upon cross-examination, by Counsel for the 1st Claimant in Cause 153 of 2015, she testified that there were no issues with CW4's performance in terms of management but there were issues in respect of his management controls. She stated that there were issues with his supervision of management and his overriding authority, which undermined her authority.

99. She testified that she raised the issues with him and the Governing Council but she did not produce any documents in Court to this effect. She testified that CW4 was part of the forensic audit that was carried out from July 2014 to January 2015.

100. She testified that the suspension letter issued to CW4 was capable of being responded to and that a management letter was given to them as an opportunity to respond to the audit.

101. She testified that she had no documents to show that there was obstruction of the audit or that CW4 never produced soft copies of the bank statements. She stated as the head of trustees she was capable of getting the statements from the bank.

102. She testified that the conduct of CW4 created a management crisis as the work environment was not conducive. She further testified that CW8 had issued his resignation letter but she did not understand why people were resigning and that they did not indict CW4 for resigning. It was her testimony that the hospital had negative publicity though she had no documents to prove this.

103. In cross-examination by counsel for the 2nd and 4th Claimants in Cause 212 of 2015 she testified that since she took over in 2012, the Respondent had not declared any losses in the audit accounts.

104. She contended that the basis of the forensic audit was the management letter and that there were irregularities. She testified that the Claimants were suspended because they were suspected of collusion but she had no documents to support this allegation. She testified that the decision to suspend the Claimants was made on 8th February 2015 and that there was a meeting on that day. She maintained that the Auditor's report was not provided to the Claimants.

105. Upon cross-examination by Counsel for the 3rd Claimant in Cause 212 of 2015 she testified that CW8 was the project manager and one of his duties was to supervise projects. She testified that the hospital had external consultants and that no project could take off without passing through procurement committee. She testified that CW8 was never issued with any disciplinary letter.

106. She stated that on 5th February 2015 he was issued with a notice to show cause. She however stated that she had not given him the forensic audit. She testified that CW8 was issued with a termination letter but there was no disciplinary hearing before termination. She testified that Jane Mugo was appointed as she is a certified forensic auditor but she had no documents confirming her appointment.

107. Upon cross-examination by Counsel for the 1st Claimant in 212 of 2015 and the Claimant in Cause 241 of 2015 she testified that her duties were to oversee the duties of sisters and that she had no duties concerning the day to day management of the hospital.

108. She contended that the auditor was the most qualified and was hired to consider the issues in question. She denied soliciting the forensic auditor. In respect of discipline, she testified that the process was provided in the Employee Handbook.

109. She contended that CW9 was not invited to any disciplinary hearing as he was reporting to the CEO who was in charge of his discipline. She testified that the matter escalated to them but the CEO did not refer the matter to them because there was a crisis. She testified that there was no clause exempting CW9 from going through the disciplinary process.

110. She contended they received a report from the Governing Council to start a Forensic Audit however, there was no report from the CEO. She contended that the external auditor brought out the issues impacting the hospital and that the CEO and Finance Controller established that there was fraud of 12 million.

111. She testified that it was CW9 and CW10's responsibility to update the ledger and that the two were mentioned in the audited accounts. She testified that the Claimants occasioned loss to the Respondent but she was not in apposition to qualify this statement.

112. She testified that CW10 used his position as a marketer to frustrate the trustees. She however testified that the forensic report was with the DCI but it is not relevant to the Court. She contended that the loss was cumulative and was not attributable to an individual. She testified that CW9 and CW10 were not in charge of banking.

113. She testified that CW10 gave unauthorised 10% discounts to Jubilee Insurance but she did not produce documents to support this claim. She testified that CW9 irregularly awarded contracts in respect of the cafeteria and that as a secretary of the Tender Committee he was not to award contracts. She however stated that she did not know how much was lost.

114. She testified that she asked the Claimants to give an explanation in the show cause letter and that a reason for suspension was given. She testified that she did not give the Claimants any evidence as to why she was suspending them. She stated that CW10 requested for documents but documents were never supplied to him. She testified that there is a disciplinary committee but the Claimants were not subjected to a disciplinary committee hearing.

115. In re-examination, she submitted that the letter of 19th January 2016 was of no confidence and however the Claimants had left at that time as they left in February 2015. She contended that the matter of no confidence had no relation to the Claimant's summary dismissal. According to her the forensic audit report is being used for recovery and the process has been filed at the Anti-corruption Court. She further contended that the report is a confidential document and is given for purposes of litigation.

116. She testified that there was a leaked copy of the audit report and that they called for a crisis meeting. She testified that the trustees did not follow the sequence of collective action as provided in the Employee Handbook as they were facing a crisis and they had to ensure the running of the hospital.

117. She contended that it is standard practice that trustees sent letters to the bank informing them of the termination of the Claimants.

118. Nicholas Muriuki, **RW2**, the Respondent's Director of Risk & Compliance adopted his Witness Statement dated 21st January 2019 and filed on 22nd January 2019.

119. Upon cross-examination by Counsel for the 2nd to 4th Claimants in Cause 153 of 2015 he testified that in 2015 he was not working for the Respondent but he could testify on what happened in 2015. He contended that non-adherence to a policy is a risk.

120. He testified that it was the Auditor who made reports in question and that he was not the author of the reports. He state that he did not know when the audited reports of 2014 were finalised and there is a risk when it takes long to have statements finalised. According to him it is possible to alter financial accounts.

121. Upon cross-examination by for the 3rd Claimant he testified that he did not know CW8 and did not know his specific role.

122. Upon further cross-examination by Counsel, for the 2nd and 4th Claimants in Cause 212 of 2015 he stated that he did not prepare the 2014 Audited Accounts and that the accounts were not the basis of the forensic audit. He testified that the audited accounts for various issues show that there were profits.

123. Upon cross-examination by Counsel for the 1st Claimant in Cause 212 of 2015 and Cause 214 of 2015 he testified that there were no findings relating to the scope of CW9 and CW10. He testified that his opinion relates to the auditors.

124. In re-examination, he state that his statement was confined to areas of financial reports and reviews. He stated that a management letter does not blame any particular individual.

125. Jane Wambui Mugo, **RW3**, stated that she is a forensic auditor and works for the Association of Certified Fraud Examiners (K) Limited. She adopted her witness statement dated 8th July 2019 as her evidence in chief.

126. Upon cross-examination by Counsel for the 3rd Claimant in Cause 212 of 2015 she testified that she had interacted with the Respondent up to January 2016 after conducting investigations from July 2014 to January 2014. She testified that she prepared the forensic report and forwarded it to the Respondent.

127. She stated that she had no evidence that CW9 misled the Respondent and that she had no minutes to show the advice she gave the Respondent. She testified that she had no documents to show project costs.

128. On cross-examination by counsel for the 2nd, 3rd and 4th Claimants in Cause 153 of 2015 she testified that when she began her investigations, she called for the Claimants files to look at cash misappropriation. She stated that after her investigations, she concluded that Kshs. 680 million was lost in the projects.

129. She testified that she neither had the forensic report in Court nor any evidence of the loss. She testified that she is not a member of ICPAK but she had a team of forensic auditors and that one of them was a Forensic Accountant but she did not know if he or she was a member of ICPAK. She stated that her report was used to charge certain persons, was aware that Duran had been charged and had heard that some Claimants were called as witnesses.

130. On cross-examination by Counsel for the 2nd and 4th Claimants in Cause 212 of 2015 she testified that it was a difficult time to acquire evidence as the Claimants were in office. She testified that she did not target the entire management and that her audit was not limited to cash. She testified that the audit extended to inventory and projects and that she looked into the audited accounts.

131. She contended that the auditors raised issues with the weakness of management of cash and bank reconciliation. She contended that Kshs 680 million was lost but she had no evidence indicating this loss. She testified that none of the Claimants has been charged in Court and that investigations are on going.

132. Upon cross-examination by Counsel for the 1st Claimant in Cause 212 of 2015 and 241 of 2015 she testified that she did not have a copy of her appointment letter to carry out the forensic audit.

133. She testified that the Head of Trustees and Chair of the Governing Council wanted to establish if there were further losses after a report showed loss of 12 million. She testified that CW10 was not directly involved in making payments but he authorised payments of commissions to various members of staff.

134. She however testified that she did not have evidence of these payments. She further did not have evidence of what CW10 lost and that she did not discuss her findings with him. In respect of CW9, she testified that he failed to ensure that the inventory was not misappropriated. She however stated she did not have any evidence in Court did not share her findings with him.

135. In re-examination, she testified that the forensic report is the subject in anti-corruption matters Court. She testified that she did not share the forensic audit report with subjects of the investigations.

Parties Submissions

Cause 153 of 2015

1st Claimant's submissions

136. The 1st Claimant submitted that for fair and lawful termination to exist, two elements must be satisfied by the employer fair procedure and valid reason. He relied on the decision in **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR.**

137. The 1st Claimant submitted that the Forensic Audit Report formed the basis of his summary dismissal and that the Respondent's counter-claim herein. He submitted that the Respondent denied the Claimants a copy of the said Report and argued that the Audited Financial Reports for the years 2011, 2012 and 2013 show that the Respondent did not suffer any financial loss as alleged.

138. He submitted that the purported summary of findings of the Forensic Audit were not filed in Court hence RW3's testimony should not be admitted. He submitted that the Court should find that the Respondent has not provided any evidence to justify the grounds for termination contrary to Section 43 (1) of the Employment Act.

139. He submitted that he was never informed of the allegations made against him in a way he could comprehend and respond to the allegations. He contended that he was barely given a day to respond and was never supplied with the Forensic Audit Report.

140. He submitted that Section 41 of the Employment Act not only obligates the employer to hear the employee but goes further to provide that an employer shall consider the employee's representations and those of his representative. He submitted that the rules of natural justice require that one should be given an opportunity to be heard and defend himself from adverse allegations.

141. He argued that the 9 Claimants herein were never given an opportunity to defend themselves thus the outcome of the alleged gross misconduct against the Claimants was biased, unfair and un-procedural. In support of this, he relied on the decision in **Navichandra Bharmal Shah v Mukesh Manvbhai Patel & 2 Others [2010] eKLR**.

142. He submitted that his victimisation is evident and that the Respondent through its offices and agents came up with flimsy reasons to terminate him. He argued that he was dismissed from office without due process of the law being followed. He submitted that the Respondent's actions violated Articles 25 and 28 of the Constitution.

143. The Claimant urged the Court to find that his suspension and dismissal without affording him an opportunity to be heard and without giving him substantive reasons as well as humiliating him amounts to unfair and unlawful termination. He submitted that Clause 7 of his contract of employment provides that he is entitled to gratuity calculated at 7.5% of his gross monthly salary for each month. He therefore urge the Court to award Kshs.2,520,000 as gratuity.

144. He submitted that pursuant to Clause 4 (c) of the contract of employment he is entitled to full salary as long as he remained suspended by virtue of a Court Order. He therefore contended that he is entitled to Kshs. 9,600,000 being half unpaid salary from 1st February 2015 when he was unlawfully suspended to 31st May 2016 when his contract was to expire.

145. In respect of leave, he submitted that pursuant to clause 10 of his Employment Contract, he is entitled to Kshs. 1,200,000 being the unpaid leave days for the year 2014. He submitted that he is entitled to aggravated damages for being subjected to distress, embarrassment and humiliation as he had satisfied the principles laid out in Gately on Libel and Slander, 12th Edition Para. 9.18 at Pg. 353.

146. He relied on Section 49 of the Employment Act and submitted that he ought to be awarded 12 months' salary as damages for compensation for unlawful termination. In support of this, he relied on the case of **Faiza Mayabi v First Community Bank Limited [2019] eKLR**. He also urged the Court to award him costs of the suit.

147. In respect of the Respondent's counterclaim for a sum of Kshs. 10,326,313.85 being half salary payments and NSSF contributions from the year 2015 to 2017, he submitted that the Court in its ruling delivered on 10th July 2015 ordered that the Claimant's suspension be in force with effect from 4th January 2015 pending the hearing and determination of the suit.

148. In conclusion, he argued that the actions of the Respondent amount to wrongful and unfair termination therefore the Claimant's case is worth prayers sought.

2nd, 3rd and 4th Claimant's submissions

149. The Claimants submitted that it is mandatory that termination is done pursuant to the provisions of Section 41, 43, 45 and 47 of the Employment Act. They submitted that the Respondent's evidence is not enough to substantiate a credible defence and that the Claimants were able to prove that they were unlawfully suspended and subsequently terminated from employment without notice nor were they subjected to a fair procedure. They submitted that no plausible reason was given by the Respondent to warrant the Claimant's suspension and subsequent dismissal.

150. In respect of the claim for unpaid salary during suspension and severance pay the Claimants relied on the decision in **Kenya union of Printing, Publishing Paper Manufacturers Limited [2013] eKLR** and urged the Court to allow this claim.

151. In respect of the prayer for damages for defamation, they submitted that the Claimants held managerial posts and were the subject in the Sunday Nation publication as annexed to their list of documents at pg. 179. Further, that the Respondent wrote letters to the 2nd and 4th Claimant's employees informing them that they had been suspended and summarily dismissed.

152. They submitted that the Respondent wrote to their banks informing them that the Claimants had been terminated. They relied on the decision in **Naqvi Syed Omar v Paramount Bank Limited & another [2015] eKLR** and urged the Court to allow this prayer.

153. The Claimants submitted that they are entitled to aggravated damages, three months' salary in lieu of notice, 12 months' salary for unfair termination and unpaid leave for the year 2014-2017. In respect of these claims they urged the Court to consider the decision in **Kenya Airway Limited v Alex Wainaina Mbugua Cause [2019] eKLR** where the Court of Appeal substituted the award for reinstatement with damages for wrongful termination, 3 months' pay in lieu of notice and unpaid leave days. They urged the Court to find that their dismissal was wrongful.

1st Claimant

154. The 1st Claimant submitted that according to the letter dated 9th February 2015 he was summarily dismissed based on the forensic audit findings. He submitted that the law governing wrongful dismissal is provided under Section 41 (2), 44 (3) & 4 (c)a and 47 (5) of the Employment Act which empowered the Respondent to summarily dismiss him if it could prove that he had breached his contractual obligations.

155. He submitted that under Section 47 (5) of the Employment Act it is the duty of the Respondent to justify the grounds for summary dismissal. He submitted that the Respondent filed an Amended Statement of Response and Counter Claim but it did not produce any evidence to demonstrate that the Claimant had deliberately and intentionally failed to perform his duties or to act in the best interest of the Respondent as the Procurement and Supply Chai Manager.

156. He submitted that the Respondent did not annex the Forensic Audit Report or the Procurement Procedure that the 1st Claimant compromised or any audited accounts to prove that it did incur loss.

157. He submitted that other than the show cause letter, the Respondent did not give him a notice for intended summary dismissal, he was not given an opportunity to defend himself and that the Respondent did not furnish him with a copy of the forensic audit report and audited accounts. He relied on the Court of Appeal's decision in **CMC Aviation Limited v Mohammed Noor [2015] eKLR** and submitted that the summary dismissal was procedurally unfair and was therefore wrongful dismissal.

158. He relied on Section 49 (1) (c) of the Employment Act and submitted that he intended to work for the Respondent until his retirement and that he had not secured alternative employment due to the allegations made against him. He therefore urged the Court to award him 12 months gross salary being KShs. 5,424,000 as compensation for wrongful dismissal.

159. He submitted that pursuant to Section 12 (3) (vii) of the Employment and Labour Relations Court Act, he had abandoned his prayer for reinstatement. He submitted that in respect of other reliefs that the Court may deem fit, he prayed for payment in lieu of notice and ex-gratia payment.

160. He submitted that Section 49 (4) (m) of the Employment Act provides for ex-gratia payment and in support of this he relied on the **Kenfreight (E.A) Limited case**. He also submitted that he is entitled to costs of the suit and urged the Court to allow his claim and dismiss the Respondent's counter-claim.

2nd and 4th Claimant's submissions

161. The Claimants submitted that RW1 admitted to overlooking procedure during termination of the Claimants due to a sensitive situation at the hospital. They submitted that RW1 admitted that no notice was issued to the Claimants, no disciplinary hearing was conducted and that no recourse was granted to the Claimants on the already made decision.

162. They submitted that the right to be heard is imperative. In support of this submission, they relied on the decision in **Kenfreight (E.A) Limited v Benson K. Nguti [2016] eKLR** and **George Onyango Akuti v Security Kenya Limited [2013] eKLR**.

163. They submitted that the 2nd Claimant had worked for the Respondent for 13 years while the 4th Claimant had worked for the Respondent for 4 years yet they had never seen a different firm of guards working at the Respondent. They submitted that the new guards treated them harshly and violated their right to human dignity under article 28 of the Constitution as they embarrassed them in the presence of their fellow workmates.

164. They submitted that the violation of the right to human dignity occurs at various degrees and their compensation is given based on the circumstances of each case and the extent of the injury suffered. They relied on the case of **MWK & another v attorney General & 3 others [2017] eKLR**.

165. They submitted that their termination did not follow procedure and that they were terminated contrary to Section 45 (2) (c) of the Employment Act. They further submitted that their dismissal did not meet the threshold under Section 44 of the Employment Act and that the Respondent was in contravention of Articles 28 and 41 of the Constitution.

3rd Claimant's submissions

166. The 3rd Claimant submitted that an employer is required to prove the reasons for termination as provided under Section 43 (1) of the Employment Act. He further submitted that Section 45 (1) of the Employment Act prohibits employers from terminating an employee unfairly and that Section 45 (2) (2) (a) and (c) of the Employment act provides that termination is unfair if the employer fails to prove that the reason or termination is valid.

167. He submitted that the Respondent's witnesses confirmed that the Respondent did not attempt to comply with the provisions of the Employment Act before terminating the 3rd Claimant therefore his termination was substantively and unprocedurally unfair. In support of this argument, he relied on the decision in **Hellen Waseka v Middle East Bank Kenya Limited [2018] eKLR** and **Faiza Mayabi Case [supral]**.

168. He submitted that the Respondent violated all statutory requirements on termination by failing to furnish the Claimant with valid reasons for termination as admitted by sister Itotia. He submitted that he is entitled to the reliefs sought as the respondent acted without

regard to the law.

Cause 214 of 2015

169. The Claimant herein reiterated the submissions of the 1st Claimant in Cause 212 of 2015. He further submitted that the Respondent did not dispute that he was entitled to a commission of 2.5% of the gross revenue and that it is not disputed that the gross revenue for the year 2009 was Kshs. 1.1 billion. He contended that he is therefore entitled the commissions being Kshs. 27,500,000.

170. He further urged the Court to award him payment in lieu of notice under Section 49 (1)(a) of the Employment Act and ex-gratia under Section 49 (4) (m) of the Employment Act.

171. In his Supplementary Submissions, he urged the Court to 10% gratuity as provided in the contract of service.

Respondent's submissions

172. The Respondent submitted that the suspension and show cause letters issued to each of the Claimants spelt out the charges based on the Forensic Audit Findings. It relied on the decision in **Judicial Service Commission v Shollei & Another [2015] 2 E.A** and submitted that there is no particular format as long as the notice communicates the allegations or charges.

173. It submitted that the Claimants in Cause 153 of 2015 did not plead or establish the breach of their constitutional claims and that they did not specifically plead special damages thus their claims must fail. In support of this, they relied on the decisions in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR** and **Gilgil Telecoms Industries Ltd v Duncan Nderitu & 56 Others [2016] eKLR**.

174. It submitted that the 1st Claimant's claim in Cause 153 of 2015 in respect of unpaid half salary when he was on suspension should fail as he no longer serves the Respondent and that he was placed on suspension pursuant to a Court order and Ruling of this Court on 10th June 2015. In respect of leave, it submitted that the Claimant did not adduce any evidence to accumulate leave and referred the Court to Clause 3.15 of the Employee Handbook.

175. It submitted that the claims for severance pay by the 3 Claimants in Cause 153 of 2015 should fail as this is only provided where termination is on account of redundancy pursuant to Section 40 (1) of the Employment Act.

176. It argued that their claim for half salary on suspension should also fail as they were suspended pursuant to a Court Order and Ruling dated 10th June 2015. It further submitted that the claims for unpaid leave are untenable. It submitted that the claims for 12 months' salary as compensation for unfair termination are not in the nature of special damages for the self-computation by the Claimants.

177. In respect of the 3rd Claimants claim for gratuity the Respondent submitted that this claim was not proved. With regards to the claim for defamation it relied on Section 4 (2) of the Limitations of Actions Act and submitted that the action must be brought within 12 months of the occurrence of the defamatory wrong.

178. It submitted that each of the Claimants admitted being paid the sums stated in the respective counter-claims on the basis of the Orders and Ruling of the Court dated 10.7.2015. It submitted that the interlocutory orders were granted to maintain status quo and that that Court should now determine the rights, obligations of the parties in the suits with finality. In conclusion, it submitted that it had proved its counter-claims and this Court should therefore find in its favour and dismiss the 9 Claimants claims.

179. I have examined all the evidence and submissions of all the Parties herein. Upon considering all the above, this Court sets out issues for determination as follows:-

- 1. Whether the Respondent had valid reasons to dismiss the Claimants herein.***
- 2. Whether the Claimants were taken through a fair disciplinary process before being dismissed.***
- 3. Whether the counter claim against the Claimants is proved.***
- 4. Whether the Claimants are entitled to remedies sought.***
- 5. Who bears costs of this claim?***

Reasons for dismissal

180. 1st Claimant in Cause No. 153/2015 – Dr. John Muriithi testified that he was suspended from service on 5th February 2015. The suspension letter stated as follows:-

“Dr. John Muriithi

The Mater Hospital

NAIROBI.

5th February 2015

Dear Dr. Muriithi,

Re: Suspension from your current position as the Chief Executive Officer and Show Cause Letter:

As you are aware, the Mater Hospital has been undertaking a forensic audit for the last seven months. The forensic audit findings are as below:-

1. You breached your fiduciary duty of care and loyalty by failure to oversee the management in the areas mentioned below:

a. Financial management

b. Procurement management

c. Credit control management

d. Construction of projects management

e. Information Technology (IT management).

2. It was also evident that you did not act in the best interest of the Hospital in various areas and as a result the Hospital suffered substantial financial loss.

Therefore you are suspended from your office as the Chief Executive Officer with immediate effect.

You are required to present a written statement showing cause why disciplinary action should not be taken against you.

This statement of show cause should be delivered to the Sisters of Mercy Provincial House Villa Maria, off Waiyaki Way, Westlands by Friday 6th February 2015 at 10 am.

Yours sincerely,

Signed

Sr. Anne Itotia

Head of Trustees – Sisters of Mercy, Kenya.....”

181. The 2nd Claimant in case No. 153/2015 Jackson Awuor was also suspended vide a letter dated the 5/2/2015. The suspension letter indicated that he did not act in the best interest of the hospital by deliberate and intentional mismanagement of debt securities, failure to follow up on collectable outstanding bills, deliberate and internal failure to keep proper books of receivables account (individual debtors lists and debtors control account), deliberate and international approval of unauthorized discounts and deliberate and international failure to exercise due care in the management of unpayable services i.e. exclusions.

182. The suspension letter asked him to show cause why disciplinary action should not be taken against him by 6th February 2015 at 10 am.

183. It appears that all the other Claimants – 3rd Claimant in 153/2015 Joyce Onyango and 4th Claimant in 153/2015 Judy Obura all received suspension letters dated the same day raising various reasons for the suspension and asking the Claimants to show cause by the following day why disciplinary action should not be taken against them.

184. All accusations against these 4 Claimants were in relation to their respective duties.

185. Accusations against the 3rd Claimant Joyce Onyango were that she directed and approved manipulation of financial records, misrepresented material financial information which were relied upon to make decisions and concealed material financial information which she had a duty to disclose, authorized fraudulent disbursements, failed to design and implement internal financial controls, compromised internal controls e.g. IT Department control and internationally failed to exercise due care as a member of the tendering and evaluation of tender committee.

186. It is apparent that these letters of show cause lacked material details and on the same day the Claimants instructed Counsel to write to the Respondent seeking some information. The letters of suspension had alluded to some findings from a forensic audit undertaken by the Respondent.

187. The Counsel sought that the Respondents avail the forensic audit report to enable the Claimants respond. The letter was served upon the Respondents on 6/2/2015.

188. The Claimants were in effect seeking better and further particulars of the reasons leading to their suspension to enable them respond to them show cause letters.

189. The Claimants contend that two days later, some received summary dismissal letters. CW1 indicated that she did not receive any dismissal letter but was informed that one had been sent to her through registered mail.

190. The Claimants contend that it they were dismissed without any hearing or being issued with any warning letters.

191. The Respondent admitted that it never furnished the Claimants with the audit report and other documents to enable them respond to accusations levelled against them. Infact the Respondent's witness indicated that the Audit Report was not necessary for the response to the charges against the Claimants and that the Claimants were not entitled to the copies of the confidential forensic report for purposes of their responses to the show cause letters.

192. The same position is maintained against the other Claimants in Cause No.212 of 2015 and 241 of 2015.

193. The Claimants in Cause No.212/2015 were James Mutiso, Susan Kagendo Karanja, Jackson Ngunjiri Gathogo and Alice Njambi. They too testified that they were served with letters of suspension and show cause dated 5/2/2015. The letters gave reasons for the suspension as being misrepresentation of material financial information, concealing material financial information, failure to keep books of accounts in relation to revenue, not acting in best interest of the Respondents, compromising procurement, internal control and execution of contracts, manipulation of cash deposit, posting in the cashbook.

194. All these 4 Claimants upon receipt of the suspension letters and show cause letters wrote to the Respondent's denying allegations raised against them.

195. Jackson Gathogo sought details of allegations against him. James Kaloki also sought specific and details of allegations against him.

196. On 9/2/2015 these Claimants were served with summary dismissal letters without further recourse. The details they sought were also not supplied to them as requested.

197. The Claimant in Cause No.241/2015 was Lawrence Muga. Lawrence who was also suspended on 5/2/2015 for misappropriating hospital funds and engaging in unauthorized transaction e.g. of signing contracts committing the hospital financially. He was asked to show cause why disciplinary action should not be taken against him by 6.2.2015 at 10 am.

198. On the same date, he wrote to the Respondents seeking to be supplied with a copy of the audit findings, as the allegations were vague. He was summarily dismissed on 9.2.2015 without any further recourse to him.

199. The main trend in all the allegations levelled against the Claimants is that they were all of a very generalized manner. The details accompanying allegations against the Claimants were never supplied to the Claimants even after they sought to be supplied with them.

200. The Respondents had relied on a forensic audit report to suspend and finally dismiss the Claimants. This report was never brought to the Claimants' notice. Other than supplying it to the Claimants, the same report was also not availed to this Court.

201. RW1 testified before Court and when cross-examined she admitted that the audit report was never supplied to the Claimants. The Respondent's RW1 also indicated to Court that she did not have any documents to prove the various accusations against the Claimants before Court. She also stated in respect of James Kaloki and Lawrence Muiga that she did not know the figures of what was lost in respect of pharmaceuticals and surgical.

202. RW2 indicated that the auditors who made the report exist. He also indicated that he did not participate in the preparation of the 2014 audited accounts. He also indicated that he did not know why the Claimants were dismissed. He also stated that the management letter relied on did not cast blame on any particular individual.

203. RW3 the Forensic Auditor who prepared the forensic audit report that the Respondents relied upon to dismiss the Claimants testified that she prepared the report as a forensic auditor.

204. She told Court on cross-examination that the Claimants misrepresented maintenance and other projects. She indicated she did not have the evidence of the same.

205. She further stated that after the audit she concluded that 680 million or so was lost in projects but she had no evidence of that loss nor the forensic report in Court.

206. From the analysis above, it is apparent that the Respondents did not give the Claimants details of the reasons for the suspension and eventual dismissal. The Claimants sought the details and they were never supplied.

207. The Respondent's witness also admitted that the forensic audit report was never supplied to the Claimants and even details of the evidence against the Claimants was not ever given to the Court.

208. Section 43 of Employment Act 2007 states as follows:-

1. "In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

2. The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee".

209. From the evidence before Court and especially from the Respondents' witness, the reasons for the dismissal of the Claimants were not explained. The details of the allegations against the Claimants were lacking and even the witness indicated that they did not have the evidence in Court. It is therefore my finding that the Respondent did not have valid reasons to dismiss the Claimants herein.

Due process

210. The Claimants were issued with suspension letters on 5/2/2015. They sought for details in the said letters to respond to the show cause issues. None was provided.

211. The Respondents admitted that none of the Claimants were subjected to any disciplinary process and that the decision to dismiss them was made in a meeting held on 7/2/2015 in the absence of the Claimants. This was in complete breach of the law which is Section 41 of Employment Act 2007 which states as follows:-

1. "Subject to Section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

2. Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make".

212. Clause 4.0 of the Respondent's Manual (see page 16 of the Manual) states as follows:-

"Standards of conduct

Corrective Action

The Mater Hospital holds each of its employees to certain work rules and standards of conduct. When an employee deviates from these rules and standards, the employee must be held accountable.

Corrective action at the hospital is progressive, that is, the action taken in response to a rule infraction or violation of standards typically follows a pattern increasing in seriousness until the infraction or violation is corrected or otherwise.

The usual sequence of corrective actions include an oral warning, a written warning and finally termination of employment. In deciding which corrective action will be appropriate, the supervisor will consider the seriousness of the infraction, the circumstances surrounding the matter and the employee's previous record....."

213. Indeed, in cases of serious infraction, it is not mandatory to issue such warnings as submitted by the Claimants. However, an oral hearing is mandatory as envisaged under Section 41 of Employment Act which is also provided for under ILO Conference 82nd Session 1995- Report III (part 4B) at page 64 Clause 150 and 151 which states as follows:-

150. "It should be noted that the opportunity for a worker to defend himself must be given before employment is terminated. Even if the worker is entitled to procedures after the termination of employment, and even if the termination is not considered as final until the appeals procedures are exhausted, it is necessary for the application of Article 7 that the worker be given an opportunity to defend himself "before his employment is considered to have been terminated".

151. "the right of a worker to defend himself laid down in Article 7 of the Convention is one of the most important aspects of the procedural requirements which employers must fulfil in many countries before they may take a decision to terminate the employment of a worker, the essential purpose of which is to ensure that the worker has an opportunity to express his point of view. These procedures are established by legislation, collective agreement and works rules, or observed in personnel practices and upheld by judicial decisions. They sometimes take on the more formal nature of an adversarial procedure beyond the requirements of Article 7 of the Convention".

214. In the case of the Claimants, this process was never accorded to them.

215. Section 45(2) of Employment Act 2007 which states as follows:-

(2) "A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure".

216. As the Claimants were dismissed without valid reasons and without following due process, I find their termination was unfair and unsuited and I declare it so.

217. The Counter claim is not proved as the witness did also not have any evidence of the allegations levelled against the Claimants.

Remedies

218. The Claimants have sought to be paid various remedies including payment of ½ salary since the termination to the time the Court ordered otherwise.

219. They also sought to be paid compensation for the unfair termination. They also seek to be paid gratuity amongst other remedies.

220. Given that the claimants were unfairly terminated, this Court had ordered they be paid ½ salary pending hearing of the claim. Some of them however continued earning the ½ salary despite finding alternative employment. It is therefore my finding that salary earned by any Claimant should be refunded to the Respondents.

221. The Claimants are however entitled to maximum compensation equivalent to 12 months' salary for the unlawful and inhuman manner in which they were terminated and bundled out of office.

222. I also award each Claimant their pension entitlement plus notice pay as per their contract of employment.

223. These amounts awarded translate as follows other than that of pension in which is payable from the pension scheme:-

1. DR. JOHN MURIITHI

1. 3 Months' salary in lieu of notice = 821,902 X 3 = 2,465,706/=

1. 12 months' salary compensation = 12 x 821,902 = 9,862,824/=

Was employed by Riara University from 3/9/2015

Less net salary from 3/9/2015 to 1st January 2017 = 4,962,794.65/=

Kshs.12,328,530-4,962,794.65 = 7,365,735.35/=

2. JACKSON AWUOR

1. 1 Months' salary in lieu of notice = 247,765/=

2. 12 months salary compensation = 12 x 247,765 = 2,973,180/=

TOTAL 3,220,945/=

3. JOICE ONYANGO

1. 1 Months' salary in lieu of notice = 710,883/=

2. 12 months' salary compensation = 12 x 710,883 = 8,530,596/=

TOTAL 9,241,479/=

4. JUDY OBURA

1. 1 Months' salary in lieu of notice = 364,963/=

2. 12 months' salary compensation = $12 \times 364,963 = 4,379,556/=$

Got employed on 1st January 2016

Less amount received from

January 2016 to January 2017 = 1,627,276.30/=

TOTAL = 2,752,279.70/=

5. JAMES MUTISO KALOKI

1. 2 Months' salary in lieu of notice = $442,146 \times 2 = 884,292/=$

2. 12 months' salary compensation = $12 \times 442,146 = 5,305,752/=$

TOTAL ... = 6,190,044/=

6. SUSAN KAGENDO KARANJA

1. 1 Months' salary in lieu of notice = 102,600/=

2. 12 months' salary compensation = $12 \times 106,600 = 2,231,200/=$

TOTAL = 1,333,800/=

7. JACKSON NGUNJIRI GATHOGO

1. 1 Months' salary in lieu of notice = 287,254/=

2. 12 months' salary compensation = $12 \times 287,254 = 3,447,048/=$

TOTAL = 3,734,302/=

8. ALICE WAMBUI NJAMBI

1. 1 Months' salary in lieu of notice = 163,944/=

2. 12 months' salary compensation = $12 \times 163,944 = 1,967,328/=$

TOTAL = 2,131,272/=

9. LAWRENCE GICAGA MUIGA

1. 1 Months' salary in lieu of notice = 465,850/=

2. 12 months' salary compensation = $12 \times 465,850 = 5,590,200/=$

Contract was to come to an end on 31st May 2015

Less net amount received

from June 2015 to January 2017 = 3,178,835.45

= Kshs.6,056,050 - 3,178,835.45 = Kshs.2,877,214.55/=

224. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this Judgement.

Dated and delivered in open Court this 25th day of October, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Wanjihia for 1st claimant I Case No.153/2015 – Present

Jude Onyango for 2nd and 3rd Claimants in 153/2015 – Present

Miss Chege holding brief Wesonga for 3rd Claimant in 153/2015 – Present

Gachuba for 1st Claimant in 212 /2015 and Claimant in 241/2015

Atieno for 2nd and 4th Claimants in 212 of 2015

Mbugua for Respondents – Present