



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

(Before Hon. Lady Justice Maureen Onyango)

CAUSE 1153 OF 2014

SUSAN MURILA..... CLAIMANT

VERSUS

RICHARD KIPKOECH LANGAT..... 1ST RESPONDENT

BOARD OF TRUSTEES OF THE

NATIONAL SOCIAL SECURITY FUND.....2ND RESPONDENT

CONSOLIDATED WITH PETITION NO. 17 OF 2015

CENTRAL ORGANIZATION OF TRADE UNIONS (COTU) PETITIONER

VERSUS

BOARD OF TRUSTEES OF THE

NATIONAL SOCIAL SECURITY FUND..... RESPONDENT

JUDGMENT

The Claimant, Susan Murila instituted this suit vide a Statement of Claim dated 10th July 2014 and filed on 12th July 2014 against Richard Langat and the Board of Trustees of the National Social Security Fund. The 1st Respondent at the time material to this suit was the Managing Trustee of the 2nd Respondent. The claimant avers that the 2nd Respondent had the responsibility *inter-alia*:

(a) for ensuring that every trustee, and particularly the 1st Respondent:

- (i) observes the provisions of the Constitution in the performance of his duties under the NSSF Act;
- (ii) acts in the best interests of the 2nd Respondent;
- (iii) acts in good faith and with integrity at all times; and
- (iv) exercises care, skill and due diligence in the conduct of the affairs of the 2nd Respondent.

(b) enforcement of good corporate governance practices within the 2nd Respondent and senior management;

(c) formulation of strategies and policies of the 2nd Respondent in accordance with the NSSF Act and best practices of good corporate governance; and

(d) effective leadership of the 2nd Respondent and guidance of the management in their day to day management of the 2nd Respondent.

The Claimant avers that on or about Friday, 3rd September 2010 the 2nd Respondent, through the agency of Messrs Price Waterhouse Coopers placed a press advertisement in the Daily Nation newspaper inviting qualified and interested persons to apply for managerial positions within the 2nd Respondent. That one of the vacancies advertised was that of Manager, Administration (ESS448/11) to be responsible for coordinating and managing service level agreements with third party agents delivering outsourced services as well as coordinating office support services such as transportation, licensing and insurance renewals, hospitality, cleaning services and mail services. The said advert further set out the key responsibilities of the Manager, Administration as follows:

- (i) Overseeing and managing office facilities and equipment;
- (ii) Managing the disposal of assets;
- (iii) Managing hospitality, cleaning services and mail services;
- (iv) Managing and coordinating licensing and insurance renewals;
- (v) Overseeing transport services and the supervision of the of the Fund's vehicle fleet;
- (vi) Monitoring vehicle usage and expenditure; and
- (vii) Providing administrative support services to the departments and branches.

She avers that following a competitive recruitment process and rigorous interviews, she was employed by the 2nd Respondent as Manager (Administration) by a letter dated 22nd December 2010, with effect from 8th February 2011 and that the said letter contained particulars of her employment, terms and conditions of service and staff regulation.

She avers that the 1st Respondent by an internal memo dated 22nd November 2013, purported to delete from the Claimant's particulars of employment, the duties of coordinating security within properties managed through service charge collections and moved the said duties to the Property Manager. That further by a memo dated 5th May 2014, the 1st Respondent purported to remove air ticketing/protocol, security services and general insurance to other departments. That the two memoranda ultimately downgraded her position and diluted her responsibilities as advertised and that such conduct by the Respondent constituted a violation of her fundamental constitutional rights. She particularises the violation of the Constitution by the Respondents as follows:

1. Violated the Claimant's right to reasonable and procedurally fair administrative action, contrary to Article 47(1) of the Constitution;
2. Violated Article 47(2) of the Constitution in failing to assign and notify the Claimant of any reason for the dilution of her employment;
3. Violated Article 41(1) of the Constitution by applying unfair labour practices of not consulting the Claimant in a matter in which she had accrued and enforceable rights;
4. Violated Article 21(1) of the Constitution in its capacity as a state organ, the 2nd Respondent failed to observe, respect, protect and promote the fundamental rights of the Claimant.
5. Violated the Claimant's inherent human dignity as provided under Article 28 of the Constitution.

The Claimant further particularises in *paragraph 12 of the Claim* the Respondents' breach of statutory duty as follows: That the respondents purported to vary general terms and conditions of employment of all employees to their disadvantage by amending the Staff Manual without right or excuse and unilaterally varied particulars of her position without her participation. That they failed to act in good faith and acted with mala fides in purporting to make changes in the position she held and giving an impression to the world that she had either failed to perform or had performed unsatisfactorily/dismally. That the 1st Respondent arrogated to himself powers which were beyond those given by the NSSF Act and violated her legitimate expectation for a fair working environment and that he further ignored responding to her inquiry regarding the unjustified interference with her employment.

She contends that the two memos mentioned herein above and the changes they purported to make to the position she held are void *ab initio* for being unlawful; are a violation of the rules of natural justice, equity and fair play and were calculated to injure her dignity, to frustrate and undermine her in the performance of her responsibilities which she has faithfully and diligently undertaken and discharged above par.

The Claimant avers that despite demand and notice given for the 1st Respondent to comply with the law and regularize the position, the Respondents have neglected, refused and/or failed to rescind their action and persist in such non-compliance. She thus prays for judgment against the Respondents for:

- a) A declaration that the Respondent's internal memoranda of 22nd November, 2013 and 5th May, 2014 are void for unconstitutionality and are a violation of statute.

- b) A permanent injunction restraining the Respondents from continuing to act in breach of the law through the dilution of the Claimant's job and/or particulars of employment.
- c) A permanent injunction restraining the Respondents from any further violation of the Claimant's constitutional and statutory rights.
- d) Costs of the suit.
- e) Such other or further relief the court may deem fit.

In her Witness Statement dated 25th March 2019, the Claimant states she applied for the position of Manager (Administration) based on the outlined job description for the said position and that upon her employment she has discharged her roles and responsibilities as detailed in the newspaper advertisement. That copies of the two Internal Memos are at page 5 and 6 of the Claimant's List of Documents which she further contends resulted to reducing her position to a mere clerical position. Further, that the Respondents' actions likely intended to render her and her position redundant and amounts to terminating her employment through the back door.

She prays that the Court allows the Claim herein so as to restore the dignity of employment and re-assert the legitimate expectation for any employee engaged for a specific position.

The Respondents filed a Statement of Reply dated 4th August 2014 averring that none of the existing Terms and Conditions of Service of the Claimant have been varied stating that she was engaged on agreed terms. That the 1st Respondent is in charge of all the staff of the Fund and oversees implementation of the decisions and resolutions adopted by the Board. That in April 2014, the Fund embarked on a realignment of its operations to achieve its extended mandate occasioned by the new NSSF Act and as such, transferred the roles of Air Ticketing/ Protocol, Security Services and General Insurance from the Claimant's department (administration) to other departments in order to increase efficiency. They contend that coordination of security within properties managed through service charge collections is a function better and efficiently undertaken by the department of the Property Manager. That without prejudice, some of the roles as alleged in *paragraph 8 of the Claim* do not form part of the Claimant's responsibilities and that the Claimant has conveniently failed to mention this fact.

They aver that the Claimant has set out blanket assertions in an attempt to make this Court believe she has been left with an office with no responsibility and contend that she still retains her position on the same grade, terms and conditions. That her key responsibilities still include overseeing and managing office facilities and equipment, managing the disposal of assets, overseeing transport services and the supervision of the Fund's vehicle fleet, monitoring vehicle usage and expenditure, managing cleaning and mail services and providing administrative support services to the departments and branches. That the restructuring of the Fund was undertaken lawfully, in good faith, for the benefit of the public and in proper exercise of the powers granted to the Fund by the NSSF Act, Employment Act, relevant Staff Regulations and the Constitution. That the Claimant has wrongly invoked the constitutional jurisdiction in a claim that is frivolous and hopelessly misconceived and that such constitutional jurisdiction should not be trivialized.

They deny the Claimant's right to fair administrative action or fair labour practice was violated as purported or that there has been any breach of statutory duty on their part. They also deny receiving demand and notice of intention to sue and state that they object to the prayers set out in the Claim because the orders sought will cripple the operations of the Fund which is in the process of implementing a new organizational structure as under the new NSSF Act. That further and without prejudice, the Claimant failed to first exhaust the internal grievance handling mechanisms as set out in the Staff Regulations and that the Claim does not disclose a reasonable cause of action against them and therefore lacks merit. The Respondents pray that the Claimant's Statement of Claim is dismissed with costs.

The Claimant filed a Rejoinder to the Respondent's Response dated 14th August 2014 wherein she joins issues with the Respondents with respect to the following:

- (i) That the alteration of the particulars of the Claimant's employment could amount or amounted to a realignment of the 2nd Respondent's responsibilities under the law;
- (ii) That the denudation of the Claimant's employment could be justified on the platform of public interest; and
- (iii) The public interest may be cited as a basis for a breach of contractual obligation.

Evidence

The claimant testified on her behalf while the respondent opted to rely on written submissions and did not call any witness.

The Claimant adopted her filed Witness Statement as her evidence in chief. She stated that the issue is the dilution of her employment without being consulted. Under cross-examination, she stated she was still an employee of NSSF under the same position and that the roles taken away from her are security and insurance. That according to the NSSF Manual, there is no provision that the respondent cannot alter the duties from an employee. She stated that her rights were violated because her job description was very clear.

Claimant's Submissions

The Claimant submits that the main issue for determination by this Court is whether the 1st Respondent, in so altering the terms of her employment and changing the particulars thereof by virtue of the memoranda dated 22nd November 2013 and 5th May 2014, was in breach of the Employment Act and in violation of her right under the Constitution of Kenya.

She submits that any assessment of the rights of an employee must have reference to fair labour practices as outlined by the Constitution, more so where the Claimant is a public officer, which position was affirmed in **Severine Luvali –v- Ministry of Foreign Affairs & International Trade & 3 Others [2014] eKLR** where the court further noted that:

“...In the context that the claimant is a public officer working

in a public body, any action taken by the claimant in her service or any decision taken by the respondent as the employer with regard to the employment of the claimant, such action must conform to both constitutional provisions as well as the legal requirements there. How the claimant is to act and is treated by the employer must be with the yardstick

of the constitution and the employment law.”

She contends she is a public officer within the ambit of **Article 260 of the Constitution of Kenya** which defines a public officer as ‘*any person other than a State Officer who holds a public office*’. The Article further defines public office as ‘*an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the consolidated fund or directly out of money provided by Parliament*’. She submits she was appointed pursuant to **Section 16 of the NSSF Act** which mandates the Board of the Fund to appoint any such officers and staff as is necessary for the proper discharge of its functions and on the terms and conditions it deems fit. Further, as a public officer she enjoys the protection of **Article 236 of the Constitution** which states that, a public officer may not be “**dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law**”.

The Claimant submits that in diluting her role, the Respondents failed to follow the due process of the law as required under Article 236 and failed in particular to adhere to the requirements of the Employment Act of prior consultation with an employee before changing their job description. That accordingly, the changes by the 1st Respondent were unconstitutional and further violated **Section 10(5) of the Employment Act**. That the 1st Respondent was under a legal duty to consult her before varying her terms of employment and also notify her of the changes in writing, as was held by the court in **Simeon Kiprotich Langat v Kenya Ports Authority & Another [2017] eKLR**. That the same was stated in **Justina Mutitu Nvaga –v- Kenya Civil Aviation Authority [2017] eKLR** by the Court of Appeal who included the requirement of consent as follows:

“Any changes to the employment status must be in writing and communicated to the employee for the employees consent; the employer should keep such record, where there is a dispute filed in court, the duty is vested upon the employer to produce such work records.”

She continues to submit that the right of an employee to prior consultation before any action which will alter their contract of employment is taken is a key tenet of the right to fair labour practices. She cites the case of **Henry Ochido v NGO Coordination Board [2015] eKLR** where the court in discussing prior consultation noted that fundamentally where the employer fails to meet mandatory provisions of the law is an unfair labour practice. She contends that any claims by the Respondents that the employer has the prerogative to make transfers of roles based on the 2nd Respondent HR Manual cannot stand and that any provisions in the said manual which contravene the Employment Act are a nullity to the extent of such contravention. She urges this Court to find that the re-designation of her job description without her prior consultation or consent violated her right to fair labour practices under **Article 41 of the Constitution of Kenya** and that the Court should grant all the prayers sought in the Claim in their entirety.

Respondents’ Submissions

The Respondents submit that **Section 10(2)(c) of the NSSF Act** empowers the Board to lay down such policies and guidelines as may be necessary for the proper operations and management of all the contributions and funds collected by the Fund and for any other matters concerning the Fund. The Managing Trustee on the other hand implements the Board’s decisions and is further responsible for ensuring effective management of the Fund as under **Section 18(8)(j) of the NSSF Act**. That the Statement of Claim instituting this suit has however sought to frustrate the Fund from discharging its lawful mandate in addition to being filed 9 months after the first memo and 2 months after the second memo.

They submit that on 1st April 2019, the Court refused to grant them time to file their witness statement and that it also did not allow them to give oral evidence even though **Rule 25(2) of the Employment and Labour Relations Court (Procedures) Rules, 2016** allows for the same. According to the Respondents, the two issues for determination are whether the change of the Claimant’s job description was such as to require her consent and if so, whether the Claimant consented to the same expressly or impliedly.

The Respondents assert that the job description from the newspaper advert had never been incorporated in the contract of employment between the Claimant and the Respondent and as such, the Claimant cannot rely on it. That when interpreting employment contract, Smith LJ in **Autoclenz Ltd vs. Belcher [2009] EWCA Civ 1046** said:

“A court or tribunal must consider whether or not the words of the written contract represent the true intentions or expectations of the parties (and therefore their implied agreement and contractual obligations), not only at the inception of the contract but at any later stage where the evidence shows that the parties have expressly or impliedly varied the agreement between them.”

That the job advertisement in the newspaper is ‘an invitation to treat’ indicating a desire by the Respondent to enter into discussion or negotiations and not an ‘offer’ which is a willingness to be bound by a contract. That the advertisement merely guided the Claimant and Respondent as to what could be expected of a Manager in charge of Administration and as such, the advert was designed to be flexible in a way that was inconsistent with its incorporation in the contract of employment. That the Claimant’s duties were those to be required by the Managing Trustee and/or Board as “*they may from time to time determine*” and that it is these terms of employment which the Claimant

accepted when she took up the offer of employment. That accordingly, it was implied that the duties she was required to perform must be duties appropriate to the function of Manager (Administration). They contend that that the contract of employment dated 22nd December 2010 also gave the Respondent the right to alter or vary the terms of employment as the Claimant specifically undertook to “*accept the above set of terms and conditions of service and any other that may be introduced from time to time*”.

It is submitted by the Respondent that the principle that an employer may reserve to itself the contractual power to vary terms in a contract of employment without consent is well established in law, as was emphasised by Lord Woolf MR in the case of **Wandsworth London Borough Council vs. D'Silva [1998] IRLR 193** as follows:

"The general position is that contracts of employment can only be varied by agreement. However, in the employment field an employer or for that matter an employee can reserve the ability to change a particular aspect of the contract unilaterally by notifying the other party as part of the contract that this is the situation.....To apply a power of unilateral variation to the rights which an employee is given under this part of the code could produce an unreasonable result and the courts in construing a contract of employment will seek to avoid such a result."

That however, the court in the **Wandsworth London Borough case** above cautioned that the right of an employer to vary particular aspects of a contract of employment should not produce unreasonable results, in that the variations must be reasonable and conscientious. The Respondents contend that the change in the Claimant's job description did not give rise to unreasonable results because the Claimant's salaries, benefits and perks remained and still are intact. That several Kenyan decisions underscore the need for consultation as prescribed in **Section 10(5)** of the **Employment Act** but none define what consultation is and how it is to be achieved. That sending correspondence constitutes consultation and they therefore consulted the Claimant through the two Memos mentioned herein above. That even so, only contractual terms require consent to change and non-contractual provisions can be modified or withdrawn at any time without consul withdrawn at any time without consultation.

They further submit that the law around variation of employment contracts envisage that an employee's consent to the variation may be express or implied and can be inferred from conduct such as remaining at work after revised terms have been imposed. They cite the case of **Hogg vs. Dover College (1990) ICR 39** where it was held that where an employer fundamentally varies a contract and the employee continues to serve, the employee may be taken to be serving a fresh contract and it is open to such an employee to bring an action for breach of contract in respect to the earlier contract while serving the new contract. That if the Claimant in the instant case was indeed aggrieved, she should either have accepted the ‘variations’ of contract or treated the contract as terminated and sue for constructive dismissal but she instead continued working and thus impliedly agreed to the reassignment of roles. That this brings into focus the doctrine of mootness which inquires whether events subsequent to filing of a suit have eliminated the controversy between parties and that to that extent, the Claimant has no justifiable dispute for determination by this Court.

The Respondents submit that judgment of this Court cannot operate to grant any practical relief to the Claimant due to the factual developments after the suit was filed and that for her to seek damages she has to demonstrate irreparable harm, but which she has not. That in the case of **Simeon Kiprotich Langat v Kenya Ports Authority & Another (2017) eKLR**, the learned Judge found that the claimant had not demonstrated any irreparable harm since he was still in his job grade and his benefits and emoluments were intact. The Judge further stated that any loss the claimant might suffer due to the transfer would be adequately compensated by way of damages. The Respondents thus urge this Court to consider the public nature of the Respondent, its functions and enabling authority and that in upholding the rule of law as per **Article 10 of the Constitution**, it ought to find that the Respondent was within its managerial prerogative to transfer/redeploy duties from the Claimant's docket.

Determination

I have considered the evidence on record and the submissions of the parties. It is not contested that upon recruitment by the respondent, the claimant was given a job description which set out her roles and duties. It is further not disputed that over time, the respondent withdrew some roles from the job description as issued to the petitioner. It is this that the claimant alleges to have violated her constitutional rights under Articles 41 (Fair Labour Practice), Article 236 which protects public servants from dismissal, removal from office, demotion or being subjected to disciplinary action without due process of the law, and Section 10(5) of the Employment Act.

The claimant's argument is that when she applied for the position of Manager (Administration) it was a powerful position covering the following key responsibilities –

- (i) Coordinating and managing serve level agreements with third party agents delivering outsourced services;
- (ii) Coordinating office support services such as transportation and supervision of the Fund' fleet of vehicles;
- (iii) Monitoring vehicle usage and expenditure;
- (iv) Managing and coordinating licensing and insurance renewals, hospitality, cleaning services and mail services;
- (v) Overseeing and managing office facilities and equipment;
- (vi) Managing the disposal of assets; and
- (vii) Providing administrative support services to other departments and branches.

She argues that the internal memoranda dated 22nd November 2013 and 5th May 2014 have the effect of diluting her job and responsibilities

and the same is being done unilaterally without consulting her and without amendment of her contract of employment in violation of the Constitution and the Employment Act.

The memos that prompted the claimant to file this suit are dated 22nd November 2013 and 5th May 2014. The first memo is reproduced below –

“SF/A/1/23 Vol. III/(35) 22nd November, 2013

All Managers

SECURITY SERVICES

In order to enhance coordination of security within properties managed through Service Charge collections, Property Management Department takes over this responsibility. This includes coordination of armed security, where applicable.

The Administration Manager, therefore hands over this function to Manager Property Management with immediate effect.

Be guided accordingly.

SIGNED

RICHARD K. LANGAT

AG. CEO/MANAGING TRUSTEE”

The second memo dated 5th May 2014 is also reproduced below -

“**Ag. General Manager (O)**

REPORTING ARRANGEMENTS

The above matter refers.

The following sections have been moved from their current departments and will henceforth report as follows:

	SECTION	FROM	TO
1.	<i>Air Ticketing/protocol</i>	<i>Administration</i>	<i>Managing Trustee</i>
2.	<i>Security Services</i>	<i>Administration</i>	<i>Property Management</i>
3.	<i>General Insurance</i>	<i>Administration</i>	<i>Capital and Money Markets</i>

SIGNED

RICHARD K. LANGAT

AG. CEO/MANAGING TRUSTEE”

5 May 2014

Cc. Ag. General Manager (F & I)”

One of the prescribed particulars of an employment contract under Section 10(2)(c) of the Employment Act is “**the job description of the employment**”

Section 10(5) provides that where there is any change in the prescribed employment particulars the employer shall in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.

The provisions of Section 10(5) are couched in mandatory terms. The provisions demand of the employer to first, make the changes in consultation with the employee, and secondly, to issue the employee with a revised contract reflecting the changes.

Without amendment of the terms of contract as reflected in Section 10(5), the withdrawal of key responsibilities as contained in her employment contract would thus amount to a breach of the contract as was held by the Court of Appeal in *The Board of Governors Cardinal Otunga High School Mosocho and 2 Others –V- Elizabeth Kwamboka Khaemba (2016) eKLR*. At paragraph 17 of the judgment the court observed that-

“The respondent was not consulted before assignment of new duties. We agree with the trial Judge that this omission amounted to a violation of Section 10(5) of the Employment Act which require an employer to consult with the employee before revision of a contract of employment.”

The importance of the provisions of Section 10(5) is demonstrated by repetition of the same requirement under Section 13(1) of the Act which provides –

(1) If, after the material date there is a change in any of the particulars required under sections 10 and 12, the employer shall give to the employee a written statement containing particulars of the change.

The court in the above case further observed that the effect of the unilateral changes in the contract of employment by the employee was that the changes amounted to a significant breach that went to the root of the employment.

Again in the case of *Justina Mutitu Nyaga –V Kenya Civil Aviation Authority (2017) eKLR* the court held that

“Any changes to employment status must be in writing and communicated to the employee for the employees consent; the employer should keep such records; where there is a dispute filed in court such as this one, the duty is vested upon the employer to produce such work records.”

In this case, I find no material evidence that the letter dated 9th October, 2008 was lifted, its terms and conditions changed and that when the respondent reviewed its human resource manual, the matter was regularised to conform with the reviewed changes. It cannot be a case that the claimant cannot seek to benefit to terms in the manual, 2011 just like other employees. The case here is not that of the application of the manual, 2011 rather it is the application and implication of the letter issued to the claimant as an employee of the respondent on 9th October, 2008 to act in the position of director, EASA and was to be paid an acting allowance of 15%.

Where the human resource reviewed in 2011 held a different position, the duty was on the respondent to issue new and appropriate directions to the claimant. Such was not the role of the claimant to initiate. The claimant cannot be denied the benefit that go with her appointment as acting director, EASA on the simple fact that the respondent had deemed it fit to review the manual that applied when the appointment was made and now was in place a new and changed manual with different terms. Where the claimant had been specifically and personally singled out to hold the position of acting director, EASA, then as a matter of law and good practice, any changes to the same should have been communicated in writing to the claimant.”

Again at paragraph 21 of the case of *Simeon Kiprotich Langat –V- Kenya Ports Authority and Another (2017) eKLR* the court observed as follows –

“21. The defence counsel submitted that the applicant has not lost his rank, benefits and emoluments as a result of the transfer. The applicant contended that he was specifically appointed to serve as a security and he has invested in training for over 30 years as a security officer and the deployment/ transfer will curtail his career progression. In addition he interpreted the transfer to amount to a disciplinary action for the alleged integrity issues. After careful consideration of the contents of the foregoing transfer letter by the respondent, I find on a balance of probability that it had the effect of varying the terms of the applicant’s contract of service. The reason for the foregoing is that the letter indicated that the board approved the restructuring and subsequent translation of the staff. The second effect of the transfer was condemning the applicant as unfit to serve in the security department on ground that he lacked integrity. The foregoing is what the applicant termed disciplinary action through transfer.

22. ...

23. ...

24. However the respondent is not above the law and more so section 10(5) of the Employment Act which required that the employer should consult with the employee before varying the matters stipulated in his contract of service and thereafter notify the changes to the employee in writing. In this case the employer has acted arbitrarily by deploying/ transferring the applicant to a new department which has the effect of varying the stipulations of his contract without prior consultations.”

In its submissions, the respondent states that the job description was never incorporated in the claimant’s contract. The respondent further submits that the employer reserved the right to change the terms of contract from time to time. It further submits that an employee’s consent to variation may be express or implied from conduct such as remaining at work after revised terms are imposed.

The respondent further submits that the employee had the option to treat the contract as terminated where the employee objected to the changes.

Several issues arise from these submissions. The first is that the respondent appears to disagree with Section 10(2) which provides that job descriptions are part of the particulars of contract that an employer must issue to the employee. The second is that the employer has a right to unilaterally revise the contract and where the employee disagrees the options available to the employee are to either acquiesce or resign and

sue for constructive dismissal.

These then raise the issue whether the respondent intended to frustrate the claimant with the aim of forcing her to resign. This is what the claimant has alleged in her evidence.

I agree with the claimant that the effect of the internal memos was

to strip her position of major responsibilities with the result that there would be erosion of a substantial component of the role of the Manager (Administration) held by the claimant. As was stated in Petition No. 17 of 2015 which was consolidated with this suit but was later settled, there was no job evaluation or approval of the changes by the respondent's board to re-allocate the roles of the Manager (Administration) to other departments. I also agree with the claimant that after being stripped of the functions set out in the internal memos, the position of the Manager (Administration) would be downgraded.

All the authorities cited by the respondent in the submissions support the position of the claimant, that unilateral variation of a contract of employment amounts to fundamental breach of the contract. The claimant thus had valid and legitimate grounds to approach this court to stop the respondent from continuing with the breach of her contract.

From the foregoing I find that that claimant has proved on a balance of probabilities that the acts of the respondent complained of in the suit were in violation of Sections 10(5) and 13(1) of the Employment Act and amounted to unfair labour practice under Article 41 of the Constitution of Kenya, 2010.

I thus make the following orders –

1. I declare the respondent's internal memoranda dated 22nd November 2013 and 5th May 2014 void for breach of Section 10(5) and 13(1) of the Employment Act and Article 41 of the Constitution of Kenya 2010.
2. A permanent injunction be and is hereby granted restraining the respondent from continuing to act in breach of the law through the dilution of the claimant's job and/or particulars of employment.
3. A permanent injunction be and is hereby granted restraining the respondents from any further violation of the claimant's constitutional and statutory rights.
4. The respondent shall pay the claimant's costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF DECEMBER 2019

MAUREEN ONYANGO

JUDGE