



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.566 OF 2018

VICKY KEMUNTO OCHARO.....CLAIMANT

- VERSUS -

THE INDEPENDENT POLICING OVERSIGHT AUTHORITY....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 9th November, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 19.04.2018 through Mercy Kareithi & Company Advocates. The amended memorandum of claim was filed on 21.05.2018. The claimant prayed for judgment against the respondent for:

- a) The declaration that the interdiction dated 16.02.2018 was illegal, irregular and unfair.
- b) A declaration that the summary dismissal handed on 13.04.2018 amounts to unfair termination.
- c) An order of reinstatement to the position held prior to the interdiction of 16.02.2018 as permanent and pensionable employee.
- d) A month's salary in lieu of notice.
- e) Damages for lost earnings from 16.02.2018 up to judgment date being monthly earnings at a rate of Kshs.194, 556.00 per month and any annual increment.
- f) Damages for unfair termination
- g) Full salary for the period under interdiction or in lieu of notice.
- h) Damages for unfair termination, being 12 months' earnings at the rate of Kshs.194, 556.00 per month.
- i) A declaration that the respondent violated the claimant's right to fair working conditions.
- j) Damages for unfair working conditions, distress and discrimination.
- k) Any other compensation the Court may deem just and fit to grant.
- l) Costs and interest.

The response to the claim was filed on 11.05.2018 through Festus Mwitii Kinoti Advocate. The amended response was filed on 31.05.2018. The respondent prayed that the claim be dismissed in its entirety with costs.

There is no dispute that the parties were in a contract of service. By the letter dated 23.12.2013 the respondent appointed the claimant to the position of Senior Human Resource Officer effective 01.02.2014. The probationary period was for 6 months and after successful service she was confirmed in appointment effective 01.08.2014 as per the letter dated 09.10.2014. She was consistently appraised on annual basis and relevant appraisal forms are on record. The claimant's performance was good and she had a clean record of service. Thus she was promoted to the position of Principal Human Resource Management Officer as per the letter dated 17.08.2016 and effective 17.08.2016. The respondent's Head of Human Capital one Rhoda Warioko resigned from that office and the claimant was appointed to act in the office as per the letter dated 25.08.2017 and effective 28.08.2017. In the meantime, the respondent advertised the position of Head of Human Capital for substantive filling. The claimant was one of the applicants. The recruitment and selection process was undertaken and the claimant was not

successful and instead, one Rhoda Ochira was appointed to the position and she reported on duty on 08.01.2018.

The claimant was served the show-cause letter dated 27.12.2017. The letter asked her to show cause, within 7 days why disciplinary action should not be taken against her. The claimant replied by her letter dated 02.01.2018 received by the respondent on 02.02.2018. The allegations levelled against her and her replies were as follows:

- a) Failure to submit details of staff contracts due for renewal in December which had not been done despite a reminder by email from the respondent's Chief Executive Officer (CEO). The claimant replied that only one staff was due for renewal in December 2017 and the relevant letter had been prepared. Others were due in January and there was still room of time to prepare their letters and there had been urgent assignments assigned by the CEO such as SRC Appeal process with Heads of Department in a retreat at Sarova Pan Afric Hotel with a consultant's assistance from 04.12.2017 to 07.12.2017 involving redoing of job descriptions for 98 positions, compiling the manual and a paper to accompany the appeal; redoing the respondent's budget after the format previously used was abruptly changed; preparation for new staff appointments and corresponding budget; coordinating rewards and retention committee meetings in preparation of end of year party; and working on the Saturday of 16.12.2017 which was not a working day but the claimant was at the office to work on payroll which required 3 days but was only halfway done
- b) Submission of December 2017 payroll on 19.12.2017 instead of 10th of the month as expected. The claimant replied that the CEO had assigned her many urgent duties directing her to act so that the payroll was ready belatedly on 19.12.2017 instead of by 10th of the month as required.
- c) Failure to submit list of staff due for confirmation after completion of probation in the months of November or December 2017 which was outstanding despite email reminder by the CEO. The claimant replied that there were three clerical officers serving in the field due for confirmation. She had written to their supervisors to forward their appraisals in the month of October 2017 but they delayed and she did a reminder and so there had been a delay in the process. Further, she stated that one employee had confused his due date of confirmation when it was not due that December and the claimant had informed the CEO accordingly.
- d) Failure to submit resolutions of the 15.12.2017 Board HR Committee for action knowing very well the resolutions were time bound. The claimant stated that she failed to submit as she could not manage to do so in view of the activities that were lined up but she had scheduled to undertake submission before the year ended.
- e) Failure to coordinate short listing of Senior Legal Officer even after the same was listed on the schedule of activities for the week starting 18.12.2017. The claimant replied that the same had not been listed in the activities of the week; the short listing panel had not been informed; the time slotted had passed and item designated as on-going; and the time it was to take place, the CEO had assigned the claimant to go to Treasury with the respondent's team to defend the respondent's budget.
- f) Failure to submit updated December 2017 staff leaves schedule after recalling an erroneous submission the claimant made to the CEO. The claimant replied that the request to prepare leave schedule had been made to her junior who was in charge of the docket who then did the job and forwarded to the CEO's office without the claimant's knowledge. The errors were brought to the claimant's attention that days given to staff were not up to date and corrections were made.
- g) Failure to process payment of resource persons who assisted in preparing JDs submitted to SRC pegging it on participation allowances for internal staff. The claimant appears not to have specifically replied to the allegation in her written reply but as will be revisited later in this judgment, she sufficiently replied at the disciplinary hearing.

The claimant further wrote that it was unfair for the CEO to take her away from her desk duties, assign her urgent duties, and at the same time expect her to deliver on all the duties that fell for her to do and which she could not delegate. She concluded, "**All those duties have since been implemented since the year had not come to an end and the same duties still being cleared by me.**"

The claimant was then interdicted by the letter dated 16.02.2018 effective the same date on half pay less statutory deduction with medical benefits and remunerative allowances.

The Human Resource Management Advisory Committee met on 19.03.2018 at 11.00am. It was decided that the Head of Human Capital who had recently reported one Rodah Ochira had handled part of the concerns leading to the disciplinary case against the claimant and that the CEO would designate another Head of Department to be secretary at the committee's meetings. The committee met on 26.03.2018 and in its deliberations observed that there was need to confirm the issue of lack of communication, that the claimant did not respond as required to the requests for further information from the incoming Head of Human Capital and the then CEO. The Committee further identified the accusations as far as they could be deduced from the entire documentation on the file as including insubordination, incompetence, and failure to perform duties. The committee again met on 28.03.2018 and in the preliminaries it is sated, "**The meeting commenced at 8.00am. The chair invited members to the meeting indicating that this portion of the hearing will seek to confirm the allegation of non-communication and further interrogate members of staff working closely with Ms. Vicky Ocharo. The Committee seating will focus on the emails and further interview the Head of Human Capital Ms. Ochira.**" The record of the proceedings show that the new Head of Human Resource one Rhoda Ochira had reported at work on 08.01.2018, provided an office but not facilitated with equipment and stationery. Rhoda is recorded as saying that the claimant was defiant and that an officer working under the claimant had confided in Rhoda that the leadership of the claimant made that officer feel disrespected, and, that another member of staff had advised the said Rhoda that Rhoda needed a lot of prayers and grace to deal with the department. Further the claimant had been interdicted on 16.02.2018 at 01.00pm and had delivered to the said Rhoda some handover notes at 01.16pm which were a slight amendment of the notes by the outgoing Head of Human Resource Capital Mrs. Rhoda Warioko at the time she had left the respondent's employment. The said new Head of Human Capital stated that the department needed at least 4 properly and adequately equipped staff with necessary skills and dedication – and the department had 3 members of staff but only 2 could perform well. The committee resolved to hear the claimant on 03.04.2018 and an invitation letter had to be done accordingly. The disciplinary hearing took place as was scheduled and the following are some of the key issues raised by the claimant:

- a) Her workload was very high after she was appointed to act as Head of Human Capital because she had to act as appointed, perform duties of her office and undertake some of the duties of a newly appointed Senior Human Resource Officer. The work was therefore overwhelming.
- b) She applied for the position of Head of Human Capital and when she was not successful it was natural as a human being to be disappointed but she continued working and performing her duties.
- c) Her ability to perform was compounded by the fact that she was under a lot of pressure because the CEO continued giving her urgent duties.
- d) She repeated the written replies to the show cause letter and on the failure to process SRC emoluments, the claimant replied that their procurement was not procedural as a result of mismanagement by the CEO's office. The Court observes that was the reply to the allegation which she had otherwise not replied to in the written reply to the show-cause letter.

The committee retreated on 10.04.2018 and it was resolved that a draft report on the case be generated. The report was prepared and handed to the CEO's office on 10.04.2018. The highlights of the report are as follows:

- a) In the letter replying the show cause letter, the claimant had used a rude language to the CEO and such tone and language confirmed insubordination.
- b) On allegations in the show cause notice the claimant had defended herself that she was overwhelmed by many duties and overlapping activities. However, the committee observed that she had not formally tabled evidence of requesting for assistance prior to the initiation of the disciplinary proceedings.
- c) The Committee resolved the claimant had been negligent in undertaking her duties.
- d) On handover the committee found that the claimant had failed to undertake it in a timely manner and comprehensively making it difficult for the incoming Head of Human Capital to operate. That was despite reminders by the CEO, Acting CEO and the new Head of Human Capital.
- e) The claimant had engaged in unprofessional and unlawful campaign to undermine the Head of Human Capital.

The Committee concluded that the claimant's contract of service was to be terminated with payment of terminal dues.

The claimant was summarily dismissed from employment by the letter dated 13.04.2018 on account of gross misconduct which, **"... constituted insubordination – failure to obey lawful orders, incompetence and neglect of duty. These are consistent with grounds for summary dismissal as per section 44 of the Employment Act"** The claimant was to clear with the respondent and complete a form to access her pension benefits.

The **1st issue** for determination is whether the interdiction of the claimant was unfair and unlawful. The claimant's case is that the interdiction was unfair and unlawful because she was not given an opportunity to defend herself or to be heard prior to the interdiction decision. The claimant has filed the Public Service Commission Discipline Manual of May 2016. Paragraph 4.2 (a) thereof provides that an officer may be interdicted where gross misconduct which is likely to lead to dismissal is reported and requires investigation, or a report that an officer has been charged in criminal proceedings has been received. The claimant has also exhibited the respondent's Human Resource Policies and Procedures manual, 1st Edition of March 2017. Clause 10.7.5 (i) thereof states that interdiction is a procedure applied on serious disciplinary cases that require investigations involving any breach of the rules and regulations in order to establish the facts of the case. The letter of appointment dated 23.12.2013 stated that the basic terms and conditions of the claimant's employment are set out in the contract of employment which comprises of the offer letter, the respondent's operational manuals and several other respondent's internal policies as may be formulated from time to time. The Court finds that interdiction was part of the agreed terms and conditions of employment and it was a preliminary process and decision in the agreed disciplinary procedure to facilitate preliminary investigations in instances whereby the respondent considered that the allegations as levelled could lead to dismissal. The Court returns that the procedure as agreed upon was with clear safeguards of what situations would lead to interdiction, payment due to the claimant during the interdiction, and limiting the interdiction period to 3 months. In view of such safeguards and agreement between the parties, the Court returns that it has not been shown that the respondent breached any of the safeguards and the Court returns that the interdiction was not unfair or illegal. The Court follows the submission for the respondent as per **Evans Rees and Others –Versus- Richard Alfred Crane (1994) 2WLR** as cited in **Nancy Makokha Barasa –Versus- Judicial Service Commission and 9 Others [2012]eKLR** that where an act or proposal is only the first step in a sequence of measures which may culminate in a decision detrimental to a person's interest, the courts will generally decline to accede to that person's submission that he is entitled to be heard in opposition to that initial act, particularly if he is entitled to be heard at a later stage. The Court finds that the interdiction was such an initial step in the disciplinary process, the claimant would subsequently be heard, and it was not necessary that she is heard in opposition to the interdiction decision and prior to taking that decision.

The **2nd issue** for determination is whether the claimant was accorded due process. It is clear that the claimant was served a show-cause letter dated 27.12.2017 and invited to reply to the allegations stated therein. The claimant replied to the show-cause letter by her letter dated 02.01.2018 and received by the respondent on 02.02.2018. The respondent then served the claimant with the interdiction letter dated 16.02.2018 and which introduced 5 other allegations including failure to prepare and submit handing over notes to the new Head of Human Capital as instructed by the CEO and the Human Resource Board Committee; refusal to avail herself for discussion on the status of various tasks in the department to enable the new Head of Human Capital settle in; lack of professional etiquette as per her unwillingness to respond comprehensively to verbal and email queries raised by the Head of Human Capital on operational procedures in the department; failure to avail herself for the meeting with acting PM&E officer to review the Human Capital 2017/2018 work plan; and submission of a wrong departmental performance report for July to December 2017 on 30.01.2018. The interdiction letter did not ask the claimant to reply to the

allegations or that the allegations amounted to a further or fresh show-cause letter. Clause 10.7.4 (i) of the respondent's Human Resource Policies and Procedures manual, 1st Edition of March 2017 states thus, **“The formal disciplinary procedure starts with a “show-cause letter”. The employee will be informed in writing by the supervisor of the nature of the complaint allegation. The employee will be required to submit his response within twenty one (21) days.”** It is clear that the interdiction letter did not invite the claimant to submit her reply to the allegations as provided under clause 10.7.4 (i) as far as the fresh allegations in the interdiction letter were concerned. The Court finds that the failure to do so amounted to serious procedural unfairness. The termination was unfair under section 45(2) (c) of the Employment Act, 2007 because it has been established that to that extent, the employment was not terminated in accordance with fair procedure and the respondent had breached the agreed procedure on show-cause letter and requiring the claimant to make submission thereto.

While making that finding the Court has considered the subsequent steps in the disciplinary process and which show a serious prejudice to the claimant bouncing from that serious procedural failure. First, at the meeting of the Human Resource Management Advisory Committee held on 26.03.2018 on matters arising, the Committee noted thus, **“4. It was further noted that Ms. Ocharo should be given an opportunity to respond to the allegations raised against her in the show-cause letter by being invited to attend a hearing.”** At that stage, the Committee was focusing on the allegations in the show-cause letter for which the claimant had been given an opportunity to reply to as opposed to those in the interdiction letter and which the claimant had not been given an opportunity to submit on.

Second, while the Committee had resolved that new Head of Human Capital had handled part of the concerns in the disciplinary case and to ensure objectivity she was to be replaced and another person to step in for the secretariat (see resolution at Minute 3.19/3/2018 of the Committee's meeting of 19.03.2018), the minutes of the meeting of 26.03.2018 at Min. 2.26/3/2018 show that the new Head of Human Capital did not comply to step aside but in clear case of conflict of interest, the minute states that the chairman drew the Committee's attention to the executive summary provided by the Head of Human Capital Department and the Committee agreed to review the entire file. In view of that minute the Court finds that whereas the new Head of Human Capital was absent at the meeting, but she had, nevertheless, already done substantial back office or desk work on the case despite the resolution that she steps aside in view of the apparent conflict of interest.

Third, the invitation to the disciplinary hearing dated 28.03.2018 required the claimant to appear for the hearing in view of the show-cause notice of 27.12.2017 and the interdiction letter of 16.02.2018. It is clear that at that point the respondent was deviating from the allegations in the show cause letter and was including the allegations in the interdiction letter. That deviation was as a result of the meeting of the Committee held on 28.03.2018 at which the new Head of Human Capital had been interviewed and made the impression that the disciplinary case against the claimant was about the relationship between the claimant and the new Head of Human Capital as highlighted in the allegations in the interdiction letter. The misdirection of the Committee is confirmed per minutes of the Committee meeting on 28.03.2018 and in the preliminaries it is stated, **“The meeting commenced at 8.00am. The chair invited members to the meeting indicating that this portion of the hearing will seek to confirm the allegation of non-communication and further interrogate members of staff working closely with Ms. Vicky Ocharo. The Committee seating will focus on the emails and further interview the Head of Human Capital Ms. Ochira.”** The Court finds that such misdirection by the Committee shows a building prejudice under which the matters in inquiry had completely changed from the disciplinary case the claimant had been invited to answer as per the show-cause letter. Thus the disciplinary hearing of 03.04.2018 saw the claimant required to answer the allegations in the interdiction letter and at length but without having been given the relevant show-cause letter in that respect and as it had been agreed to constitute the start of a disciplinary case. The Court finds that the same was procedurally unfair.

The 3rd issue for determination is whether the respondent has established that the reasons for termination were genuine as per sections 43 and 47(5) of the Employment Act, 2007. The evidence is clear. As for the ensuing allegations in the interdiction letter, it is clear that there was no show-cause notice and the new Head of Human Capital was involved, as already found, in preparing the brief that guided the Committee. The disciplinary process was impaired by the conflict of interest that ensued and further irreparably impaired by the failure to issue a show-cause notice in that regard. The Court considers that it will not be necessary to delve into the matter at detail because the conflict of interest and the procedural impropriety would render the findings in that regard a nullity so that in that respect, as at the time of termination, the respondent cannot be said to have had a genuine or valid reason to dismiss the claimant as was founded upon the subsequent allegations in the interdiction letter.

While making that finding, the Court notes that there is evidence that the claimant and the new Head of Human Capital had been competitors at the just concluded interviews for the post of Head of Human Capital. It was not in dispute that the respondent's policies provided for induction of new officers joining the organisation but had not prescribed standing policy on handover to new officers by outgoing officer. Thus the Court returns that the new Head of Human Capital was entitled to an induction programme as had been prescribed and not to a handover by the claimant in a format prescribed by the new Head of Human Capital as was done. To that extent the claimant would be exculpated and in any event, the Court considers that the ensuing workplace interrelationships between the claimant and the new Head of Human Capital would be subject to grievance management procedures as instituted by the respondent but which appears not to have been done. It is in section 46 (h) of the Act that it is provided that initiation of a valid grievance or complaint that is responsible and with foundation cannot constitute a fair reason for termination. It is the Court's view that after the competitive interviews, any matters arising from the relationship between the participants that were now both in the employment of the respondent deserved appropriate grievance management without the need to subject the claimant to disciplinary process leading to dismissal as was done. The Court has noted that the claimant had a clean record of service and had delivered on her duties as per the appraisals on record so that the arrival of the new Head of Human Capital appears to have been the significant cause of her predicament and subsequent dismissal.

As for the allegations in the show cause notice, the Committee had considered her replies and the Committee in its final report found that the claimant had defended herself that she was overwhelmed by many duties and overlapping activities. However, the Committee observed that she had not formally tabled evidence of requesting for assistance prior to the initiation of the disciplinary proceedings. The Court finds that it was unreasonable to punish the claimant for obvious failures by the respondent to provide enough staff and to assign the claimant work beyond her reasonable capacity to perform. The evidence was that the claimant had put in adequate effort beyond the call of duty including working on weekends and beyond normal hours. The new Head of Human Capital had confirmed to the Committee at the meeting of 28.03.2018 that the Human Capital Department had been understaffed and the competence of the officers (not being or including the claimant) was wanting. The Court finds that the same tallied with the claimant's evidence that the department was understaffed and the officers who worked under the claimant at all material times were not competent enough. The Court finds that such were operational deficiencies by the respondent, the claimant was doing her best in the circumstances, and it was unfair to visit her with the dismissal. In view

of that finding and the deficient operational system in that regard, the court upholds its opinion in **Grace Gacheri Muriithi –Versus- Kenya Literature Bureau (2012) eKLR** thus, **“To ensure stable working relationships between the employers and employees, the court finds that it is unfair labour practice for the employer to fail to act on reported deficiencies in the employer’s operational policies and systems. It is also unfair labour practice for the employer to visit upon the employee adverse consequences for losses or injury to the employer attributable to the deficiency in the employer’s operational policies and systems. The court further finds that it would be unfair labour practice for the employer to fail to avail the employee a genuine grievance management procedure. The employee is entitled to a fair grievance management procedure with respect to complaints relating to both welfare and employer’s operational policies and systems. The court holds that such unfair labour practices are in contravention of Sub Article 41(1) of the Constitution that provides for the right of every person to fair labour practices. Further the court holds that where such unfair labour practices constitute the ground for termination or dismissal, the termination or dismissal would invariably be unfair and therefore unjust.”**

In this case, it was unfair for the Committee to take the view that the claimant ought to have reported the deficiency in staff and the overwhelming work that had been assigned because in the opinion of the Court, the same were obvious and within the respondent’s knowledge. It is notable that it was around the same time that the respondent was hiring the new Head of Human Capital and it would not only be awkward but also unreasonable for the respondent to lack awareness that prior to the new Head of Human Capital assuming office, the claimant must have been overwhelmed and the department understaffed. Further the Court finds that it was clear that as at the time of termination the claimant had established such staffing deficiencies and overwhelming duties that were assigned to the claimant and the claimant’s explanation was not defeated in any manner by the assigning officer, the respondent’s CEO. In particular the Court has seen the exhibits on the claimant’s amended memorandum of claim and it is clear that the claimant was assigned many and urgent duties which within her human capacity she could not accomplish all of them despite her established extra effort in that regard. On the allegation of failure to process payment of resource persons who assisted in preparing JDs submitted to SRC pegging it on participation allowances for internal staff, the claimant appears not to have specifically replied to the allegation in her written submission but at the hearing she had explained, and the explanation had not been challenged, that the persons to be paid had not been procured procedurally and therefore she faced a challenge in processing the payments as had been expected. The Court considers that the claimant had thereby exculpated herself of the allegations as levelled against her in the show-cause letter. The Court therefore concludes that had the respondent carefully addressed itself to the pertinent issues at hand, it would have been obvious that as at the time of termination, there were no established genuine reasons to dismiss the claimant summarily as was decided and done.

To answer the **4th issue** for determination the Court returns that the claimant was entitled to move the Court as she did even if she did not exhaust the internal appeal procedure. It was submitted that the claimant ought to have exhausted the appeal procedure prior to filing the suit. However the Court finds that clause 10.7.9 conferred the right to appeal to the respondent’s board but the claimant had an option to file the suit after dismissal in view of section 90 of the Act which prescribes the cause of action to accrue immediately a termination takes place. The administrative appeal process was not time bound and the Court’s view is that any delay would seriously prejudice the claimant’s case before the Court especially that the claimant was also seeking an interlocutory relief in the matter. Further, the claimant was seeking reinstatement and under section 12(3) (vii) of the Employment and Labour Relations Court Act, 2011 an order for reinstatement of any employee will be available within three years of dismissal. Further, the Court finds that the respondent’s submission that the suit was bad in law because summons to enter appearance had not been served was cured (and as envisaged within the principles in Article 159 of the Constitution of Kenya, 2010) by the respondent’s actions of filing the statement of response and fully participating throughout the proceedings as no prejudice has been established. The Court returns that the preliminary objections to the Court’s jurisdiction in that regard will fail.

The **5th issue** for determination is whether the claimant is entitled to the remedies as prayed for. The Court has considered the material on record and findings are made as follows:

- a) The Court has found that the interdiction step was agreed upon and implemented accordingly so that the claimant is not entitled to the declaration that the interdiction dated 16.02.2018 was illegal, irregular and unfair.
- b) The claimant is entitled to the declaration that the summary dismissal handed on 13.04.2018 amounts to unfair termination.
- c) The claimant prayed for an order of reinstatement to the position held prior to the interdiction of 16.02.2018 as permanent and pensionable employee. It was submitted for the claimant that the claimant is willing to go back and continue in the respondent’s service. Further the separation had been for a short period of time effective 19.04.2018 so that the claimant can easily catch up with her duties as the respondent’s Principal Human Resource Officer. For the respondent it was submitted that the reinstatement is a discretionary remedy and as per section 49 (4) (d) of the Employment Act, it is the common law principle that there should be no order for specific performance in a contract of service except in very exceptional circumstances. In the present case, it is an exceptional circumstance that this Court conveys to public officers that despite the open and competitive filling of vacancies in the public service, once the recruitment, selection and appointment process is concluded, the participating officers must settle down and continue in public service, working together as a team, and none is entitled to design to force the other out of service on account of the outcome of the recruitment, selection and appointment process. In the present case, it was until a new Head of Human Capital was appointed that the claimant’s otherwise excellent, dedicated and loyal service was brought to question. It is not lost to this Court that the record shows that the circumstances surrounding the claimant’s dismissal significantly related to the failure by the new Head of Human Capital to go over the concluded recruitment, selection and appointment process including the fact that the claimant had been acting in the office in issue. The record shows that the new Head of Human Resource appears to have acted in a manner or to have had expectation that was rather contrary to tenets of public service delivery. For example she instituted and demanded a handing over by the claimant in a format she had unilaterally formulated and instead of undertaking an induction which the respondent had prescribed for new officers. The claimant had told the Committee, and it was not disputed at all, that she had afforded the new officer, on urgency basis, information she required to do her role to offload activities to her. Such information included adverts and job descriptions, staff salaries, medical scheme, staff establishment, and procurement reports. On the other hand, it is disturbing that the incoming Head of Human Resource had told the Committee at the meeting of 28.03.2018 thus, **“Ms. Ochira further reported that during her first week, Mr. Leo Boy Julians confided in her with regard to the difficulties he underwent under the leadership of Vicky Ocharo, whereby he felt disrespected. She was also advised by another member of staff that she needed a lot of prayers and grace to deal with the staff in the department”** There are no reports by the said Leo Boy on record about the allegations in the quotation and it therefore appears that the officer had gone out of way to engaged in gossip against the claimant. The Court finds that such conduct fell short of professional delivery of public service. The Court

considers that it must discourage public officers from engaging in such unprofessional conduct after conclusion of recruitment, selection and appointment or promotional decisions and any such unprofessional conduct would not be allowed to occasion a public officer's dismissal after the officer's consistent and long investment in capacity building and as was the case in the present matter. Such are circumstances that the Court considers to be exceptional so as to justify a reinstatement. The Court considers that public officers already in service must cooperate with their new supervisors in line with promotional and appointment decisions and newly appointed supervisors must seek to amicably take over office without antagonising those working under them even in circumstances whereby they were competitors during the recruitment, selection and appointment or promotion process. It is also that the claimant appears to have been angry and sad about the outcome of her participation in the process of filling of the vacancy of the Head of Human Capital. The Court's view is that the two officers must remain professional and continue in service in accordance with the ethos and clearly settled provisions on good public service delivery. Taking the findings into account, the Court finds that there was no evidence, as urged for the respondent, that the employer-employee relationship had irretrievably broken down but the evidence was that the parties had a problem managing the transition after a new Head of Human Capital was appointed - a scenario that the Court must discourage from recurring in our public service. The respondent did not submit on any impracticability to reinstatement other than urging that the relationship had broken down irretrievably but the Court has found otherwise. It is not in dispute that the vacancy flowing from the dismissal was available; the appraisal reports showed that the claimant was a good officer in her service delivery and she had been promoted accordingly; and the claimant is willing to continue in service as no considerable time had lapsed to make her out of step with the expected delivery standards. Considering all the circumstances of the case, the Court returns that the claimant is entitled, as an alternative remedy to due payments as may be ordered, to reinstatement from the effective date of the dismissal with full back payment and other attached benefits since the date of interdiction and to continue in the respondent's service on permanent and pensionable basis as the respondent's Principal Human Resource Officer in accordance with the relevant law and the contract of service. Further, while giving the option of reinstatement, the Court has considered the values and principles of public service in Article 232(1) (a) and (b) on high standards of professional ethics; and efficient, effective and economical use of resources. It is the opinion of the Court that reinstatement will offer the parties an opportunity to comply and not for the respondent to simply pay out money to the claimant out of public funds, as may be ordered, in circumstances whereby the experienced claimant can continue in public service and only be paid after working accordingly.

d) The Court considers that if reinstatement is not the option, then the claimant is entitled to a month's salary in lieu of notice making **Kshs.194, 556.00** as submitted for the claimant and as per the terms in the letter of appointment.

e) The claimant prays for damages for lost earnings from 16.02.2018 up to judgment date being monthly earnings at a rate of Kshs.194, 556.00 per month and any annual increment. The Court considers that the amount is payable under the option of reinstatement. If reinstatement is not the option, the Court considers that the award of compensation for unfair termination would cover such considerations so that the amount awarded would be sufficient in terms of unfair termination. Further, the Court considers that the dismissal having been found to have been unfair, the claimant would be entitled to all half salaries and allowances withheld during the interdiction period (from the date of interdiction to the date of the dismissal letter). The court follows the holding in **Grace Gacheru Muriithi –Versus- Kenya Literature Bureau (2012) eKLR**, in which the court stated thus, **“The court considers that an employee on interdiction or suspension has a legitimate expectation that at the end of the disciplinary process he or she will be paid by the employer all the dues if the employee is exculpated. Conversely, if the employee is proved to have engaged in the misconduct as alleged and at the end of the disciplinary process the employee has not exculpated himself or herself, the court considers that the employee would not be entitled to carry a legitimate expectation to be paid for the period of suspension or interdiction. Thus, the court holds that whether an employee will be paid during the period of interdiction or suspension will depend upon the outcome of the disciplinary proceedings. It would be unfair labour practice to deny an employee payment during the period of interdiction or suspension if at the end of the disciplinary process the employee is found innocent. Similarly, it would be unfair labour practice for the employer to be required to pay an employee, during the suspension or interdiction period if at the end of the disciplinary process the employee is found culpable. Accordingly, the court finds paragraph 6.2.4 of the respondent's Terms and Conditions of Service to be unfair labour practice to the extent that the provisions deny the employees payment even in instances where they exculpate themselves at the end of the disciplinary process. To that extent, the provision offends Sub-Articles 41(1) of the Constitution; it is unconstitutional.”**

f) The claimant prays for damages for unfair termination. It is clear that the claimant desired to continue in service, she was on permanent and pensionable terms and anticipated to retire at the age of 60 years (and was about 47 years of age), she had a clean record of service of over 4 years but for the ensuing disciplinary process. The Committee took the view that she had been rather harsh in language in replying the show-cause notice by the respondent's CEO and when she stated in her reply that she was totally perturbed as to how the office of the respondent's CEO operated. The claimant told the Committee that she was aggrieved by the show-cause letter and she was angry so that by the time she submitted her reply to the show-cause letter, she had suffered an oversight to change the harsh wording. In such circumstances the Court finds that the claimant by her language in the reply to the show-cause letter contributed to her ensuing predicament. The Court has considered all the material factors and under section 49 of the Act awards the claimant 10 months' compensation at Kshs.194, 556.00 per month making **Kshs 1, 945, 560.00** for unfair termination. The award is made in alternative to reinstatement.

g) The claimant prays for a declaration that the respondent violated the claimant's right to fair working conditions. It was submitted for the claimant that the claimant worked extra hours such as on Saturday and public holidays so as to meet the deadlines for the many assignments she was given. The Court finds that the claimant put in extra effort voluntarily and in appreciation of the need to deliver at her level of engagement or office she held. The Court will not find the taking of such good initiative by an employee to amount to unfair labour practices. In any event, the Court has taken into account the claimant's clean and good record of service in awarding reinstatement or compensation for the unfair termination and ends of justice have sufficiently been served in that regard. The prayer together with that for damages for unfair working conditions, distress and discrimination will therefore fail.

In conclusion judgment is hereby entered for the claimant against the respondent for:

1) The declaration that the summary dismissal handed on 13.04.2018 amounts to unfair termination of the contract of service between the parties.

2) As an alternative remedy to due payment ordered under (3) below, the claimant is reinstated from the effective date of the dismissal with full back monthly payments and other attached benefits or allowances since the date of interdiction and to continue in the respondent's service on permanent and pensionable basis as the respondent's Principal Human Resource Officer in accordance with the law and the contract of service; and for that purpose, the claimant to report to the respondent's CEO not later than 15.11.2016 for assignment of duty and by which time the respondent shall have exercised option in that regard, one way or the other.

3) In alternative to 2 above, the respondent to pay the claimant:

a) **Kshs.2, 140, 116.00** in lieu of notice and compensation for unfair termination; and

b) all half salaries and allowances withheld during the interdiction period (from the date of interdiction to the date of the dismissal letter).

4) The money payable consequential to reinstatement or under order (3) above be paid by 05.12.2018 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.

5) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 9th November, 2018.

BYRAM ONGAYA

JUDGE