



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

PETITION NO.48 OF 2012

DOMITILA WANZILA MUVANYA PETITIONER

VERSUS

INSURANCE REGULATORY AUTHORITY 1ST RESPONDENT

SAMMY MUTUA MAKOVE..... 2ND RESPONDENT

GODFREY KIMAIYO KIPTUM..... 3RD RESPONDENT

MARY WANJIRU AZEGELE..... 4TH RESPONDENT

THE ATTORNEY GENERAL..... 5TH RESPONDENT

MINISTER FOR FINANCE 6TH RESPONDENT

AND

FELIX CHELIMO INTERESTED PARTY

JUDGEMENT

1. Through a petition filed on 14th December 2012, the petitioner, Domitila Wanzila Muvanya is seeking for orders that;

a) The purported recruitment and employment of the interested party as Head of Procurement Unit contravened the petitioner's rights and fundamental freedoms and violated the Constitution of Kenya and is therefore unconstitutional, illegal, invalid, null and void ab initio and of no effect;

b) The forced demotion of the Petitioner from the position of Head of Procurement Unit without notice, justifiable cause or due process of the law and procedure contravened the petitioner's rights and fundamental freedoms and violated the Constitution of Kenya and is therefore unconstitutional, illegal, invalid, null and void ab initio and of no effect;

c) The summary dismissal of the Petitioner by the 1st Respondent is contravention of the petitioner's rights and fundamental freedoms in the Bill of Rights and her rights in the Employment Act and is therefore unconstitutional, illegal, invalid, null and void and of no effect;

- d) Summary dismissal of the Petitioner by the 1st Respondent was in gross violation of the Constitution of Kenya and the Employment Act, the Public officer Ethics Act and is therefore unconstitutional, illegal, invalid, null and void and of no effect;
- e) The summary dismissal is an unfair termination of the petitioner's contract of service and is therefore unconstitutional, illegal, invalid, null and void and of no effect;
- f) The Petitioner be and hereby reinstated as Head of Procurement Unit of the 1st respondent without loss of status, powers, benefits and responsibilities;
- g) The petitioner's salary be and is hereby reviewed to a monthly gross of Kshs.402,000.00;
- h) In lieu of reinstatement, the 1st Respondent do pay the Petitioner the sum of Kshs.4,824,000.00 being 12 months gross salary compensation for unfair termination computed at kshs.402,000.00 per month and being the current salary for the interested party.
- i) In lieu of reinstatement, the 1st Respondent do pay the Petitioner the sum of Kshs.42,008,000.00 being the petitioner's pay up to retirement age of 60 years calculated at Kshs.402,000.00 per month;
- j) The Respondent do pay the Petitioner the sum of Kshs.2,730,000.00 being the difference in pay between the Petitioner and the interested party with effect from August 2010 to November 2012;
- k) The Respondents do pay damages and compensation for contravening the petitioners rights and fundamental freedoms secured in the Bill of Rights;
- l) The Respondent do compensated the Petitioner for unfair and unlawful termination of her contract of service;
- m) Having contravened the petitioner's rights and fundamental freedoms in the Bill of Rights, the 2nd, 3rd, and 4th Respondents be found unfit to hold or continue holding any public office in Kenya and hereby be retired in public interest;
- n) The Petitioner be indemnified by the Respondents of all costs and expenses reasonably incurred in prosecuting this petition;
- o) The Respondents do pay the Petitioner the costs of this petition plus interest until paid in full
- p) The Respondents do pay the Petitioner interest on awards above at Court rates.

Parties

2. The Petitioner is a procurement professional with wide experience in procurement management in the public sector and employed as head of procurement unit by the 1st respondent. The 1st Respondent is a state corporation established under section 3 of the Insurance Act charged with regulation, supervision and development of the insurance industry in Kenya. The 2nd Respondent is the Commissioner of Insurance of the 1st Respondent and responsible for the running of the 1st Respondent pursuant to section 3E of the Insurance Act and section 27(2) of the Public procurement and Disposal Act, 2005. The 3rd Respondent is the Human Capital Development and Administration manager of the 1st Respondent charged with advisory, recruitment, retention, development and management of staff and their welfare. The 4th Respondent is the Senior Human Capital Development officer of the 1st Respondent and the principal assistant to the 3rd respondent. The 5th Respondent is the attorney general under article 156 of the Constitution and charged with promoting, protecting and upholding the rule of law and defending

public interest. The 6th Respondent is the Minister in charge of Finance and charged with the duty to appoint, supervise and appraise the performance of the 2nd respondent, policy guidance, oversight and general supervision of the 1st Respondent and is a party herein as a key stakeholder who is expected to take administrative and disciplinary action as may be ordered by the Court so as to protect the public interest, trust and funds in the affairs and dealings within the 1st respondent.

3. The interested party is the head of procurement at the 1st Respondent and currently in charge of the procurement function and enjoined as a stakeholder likely to be affected by the outcome or determination of the petition.

Petition

4. The petition is that the Respondents by themselves and or through their agents have violated the constitutional and legal rights of the Petitioner to warrant the grant of the orders sought. On 23rd April 2010 the 1st Respondent advertised for the position of Senior Procurement Officer as the Head of the procurement Unit and set out the duties and qualifications of such officer. On 25th August 2010 the 1st Respondent appointed the Petitioner as Senior Procurement Officer pursuant to a competitive recruitment process with a salary of kshs.233, 000.00 per month. The terms were reviewed on 12th October 2012 to 297,000.00 per month as gross salary. Before joining the 1st Respondent the Petitioner was an employee of Kenya Pipeline Co. Ltd on permanent and pensionable terms.

5. The petition is also that the Petitioner performed her duties diligently as provided for under the Public Procurement and Disposal Act, 2005 and its regulations thereto, the Public procurement and Disposal Regulations, 2006. The Petitioner was the head of Procurement department. In the course of undertaking her duties, the Petitioner differed with the 2nd and 3rd Respondents particularly on matters pertaining to procurement procedures which disagreements led to deterioration in work relations as the Petitioner was a stickler to the law particularly article 232 of the Constitution and the PPDA and its regulation in procurement procedures. This led the 3rd Respondent to issue the Petitioner with show cause notices on flimsy issues. As a result, members of staff who had personal interests in the procurement process were allowed to pursue such personal interests in disregard of the law and meant to push the Petitioner out of her employment with the 1st Respondent despite her good performance.

6. On 15th June 2012, the 1st Respondent published in the newspapers inviting applications for the '*vacant position of Head of procurement*' and also posted in their website. The duties and responsibilities for the officer were a replica of the position held by the petitioner. The Petitioner only learnt of the vacant position when she was instructed to ensure that the notice was published in the newspapers as per procured space. The advertised position was however of lower than the position advertised on 23rd April 2010 and which the Petitioner had been hired for. The Petitioner did not apply until the 2nd Respondent prevailed upon her to do so before the deadline on 6th July 2012.

7. On 14th August 2012 the Petitioner was invited for an interview conducted by the 2nd and 3rd respondents, the finance manager and the assistant technical manager all of whom the Petitioner had disagreed with over unprocedural procurement and disposals. The panel was therefore not imperial.

8. The Petitioner was never interviewed save that the 2nd Respondent stated that he was unhappy with her performance. There was no substantiation. The Petitioner was never informed of the outcome of the interview until 26th October 2012 after the interested party had taken over her office and duties. The Respondent was therefore determined to get rid of the Petitioner and to replace her with a person who would play along and participate in the violation of procurement procedures. On 12th October 2012 the interested party acting on instructions of some interests within the 1st Respondent cancelled 4 tenders through the media on the day they were to be opened and without giving reasons and without refunding the tender fees paid to 1st respondent. This attracted the attention of the Public Procurement Oversight

Authority (PPOA) who demanded for reasons.

9. On 1st October 2012, the interested party formerly took over the office of Head of procurement Unit. On 3rd October 2012 the Petitioner was directed by the 3rd Respondent to hand over office to the interested party by 10th October 2012. On the same date the 3rd Respondent held a meeting with the 4th respondent, interested party, the petitioner, Anthony Macharia (Logistics officer) and Stephen Mumo (contract staff) where the interested party was introduced to staff. The Petitioner requested the 3rd Respondent to give her a job title, description and noting the new developments.

10. The Petitioner asked for reasons as to why her job had been changed without consultation or consent and why she had been demoted. On 12th October the 2nd Respondent revoked the petitioner's appointment as the secretary of the Tender Committee and instructed her to do hand over to the interested party. She was also give a revised job description, allocated different duties, effectively being a demotion.

11. On 22nd November 2012 the 4th Respondent cancelled the petitioner's pre-approved and pre-paid training in Dubai scheduled for 26th to 28th November 2012 citing exigencies of work in the procurement unit and instructed her to report back on 26th November 2012. Her air ticket was also cancelled. Her ticket to London to attend MSc in Procurement Management on 7th to 9th December 2012 was also cancelled despite the tuition fees having been fully paid. This cause a loss of Kshs.1, 050,000.00 to the tax-payer.

12. On **26th November 2012** the 3rd Respondent issued the Petitioner with letters of results of the interview conducted on 14th August 2012; caution letter for failing to offer guidance in the disposal of vehicle Reg. No. KBG 140C; and letter directing her to hand over to the interested party. On the same date, the Petitioner was issued with a letter of summary dismissal.

13. The petition is also that the advertisement of her job position while she was still in office was malicious and in bad faith and was actuated by ulterior motive and meant to punish her for her integrity and independence. The conduct of the Respondents in recruiting the interested party was meant to force the Petitioner out of employment without due process. The Petitioner was discriminated against when the interested party was employed at a higher grade than she was despite having more work and years of experience on the job. The petitioner's demotion and dismissal were with the motive for the Respondent officers to gain full control and abuse of procurement process and contrary to article 227 of the constitution, and the PPDA and its regulations. That the conduct of the interested party was in tandem and complimentary to that of the 2nd, 3rd and other officers of the Respondent of wilful breach of the law and abuse of office through illegal and unprocedural procurement of works and services. This included the procurement of a research project to evaluated the performance of insurance products in which the 1st Respondent paid USIU Kshs.1,974,500.00 without following due process and contrary to PPDA; procurement of development of information, education and communication materials form the college of insurance in disregard of the law; procurement of entertainment service from Sankara hotel without following procedures; procurement of floor partitioning and alternation works from Crissam Acreas Ltd; variation of contract between 1st Respondent and Garden Hotel Machakos from 1,260,000.00 to 1,713,960.00 approved by the 1st Respondent without procedure; procurement of services from Tribe hotel without following the procurement procedures; procurement and fixing of bulbs o 2nd, 6th and 7th floors by the 3rd Respondent without following the procurement procedures; 3rd Respondent developed a procurement procedure for procurement of travel services to be undertaken by an unqualified staff and coordinated by the 3rd Respondent himself contrary to the PPDA; unprocedural procumbent of travel insurance services of unknown value from AIG by non-qualified staff on Susan Opiyo contrary to the law; and this has led the national Audit office has since questioned the illegal and unprocedural procurements by the respondents.

Violations

14. The actions of the Respondent violated the petitioner's rights under article 19, 20, 21, 24, 25, 27, 28, 29, 41, 47, and 236 of the constitution. By paying the interested party Kshs.402, 000.00 against the petitioner's gross salary of kshs.297, 000.00 for work of equal value was an act of discrimination directly against the Petitioner and contrary to fair labour practices. The revocation of the petitioner's appointment as Secretary to the Tender Committee and being forced to hand over to the interested party was inhuman and degrading

Respondent's Case

15. In response to the petition, the Respondent through the Replying Affidavit of Sammy Mutua Makove. Mr Makove states that as the 2nd Respondent and the chief officer of the 1st Respondent he has authority of the 3rd and 4th Respondents to reply herein as they all acted in their official capacity.

16. Mr Mukove also states that the Petition is incurably defective for misjoinder of officers of the 1st Respondent as parties herein and should be struck out. The Petitioner was never the Head of Procurement Department of the 1st Respondent at any given time or at all. Upon competitive recruitment process on 25th August 2010, the Petitioner was appointed as Senior Officer in charge of the procurement unit which was within the human capital development and administration division reporting to the Human Capital Development and Administration Manager of the 1st respondent. The petition did not have any duties as head of the procurement department. She attended management meetings not as a member but to share progress reports as the secretary to the Tender Committee of the 1st Respondent and which was revoked after the appointment of the substantive office holder of head of procurement was appointed.

17. Mr Mukove also states that upon the Petitioner being appointed as senior procurement officer on 30 August 2010, she remained on probation for a longer period due to incompetence and lack of skill to run the unit until 19th August 2011 when she was confirmed. By memo dated 5th January 2011 the Respondent delinked the procurement unit from human capital development and created the head of Procurement that was directly under the chief officer. On 14th February 2012 it was agreed that more personnel would be added to the procurement unit. This delinking of procurement unit was supported by the Kenya National Audit Office (KNAO) that recommended a section with its head reporting directly to the chief officer. This was approved by the respondent's board which was to hire the head of the unit. Towards this on 15th June 2012 the Respondent placed an advertisement in the print media with details of the position – Head of Procurement. The Petitioner applied together with other candidates. This was an acknowledgement by the Petitioner that a new position of head of procurement had been created and would be competitively recruited.

18. The Respondent appointed the Interested Party as the successful candidate for the position of head of procurement. The Petitioner was informed that she had been unsuccessful in her application. She was therefore asked by her then supervisor the Human Capital Development and Administration Manager via memo dated 3rd October 2012 to hand over to the head of procurement by 10th October 2012.

19. The Petitioner was also informed that her job and remuneration had not changed and with the creation of the new position of head of procurement, her duties and responsibilities would change. Therefore, by application of section 26(5)(b) of the PPDA which requires that the Tender Committee to have a senior procurement professional as its secretary, by letter dated 12th October 2012 the appointment of the Petitioner as such was revoked and the mandate handed over to the interested party as head of procurement unit. The Petitioner refused to hand over as directed by her supervisor.

20. Mr Mukove also states that by provisions of section 10(5) of the Employment Act, the Petitioner was informed of the changes to her duties and responsibilities in writing but she declined to sign. On 22nd October 2012 the Petitioner replied noting that she had been demoted and her constitutional rights violated when the 1st Respondent recruited the interested party. In reply, the Respondent noted that the employment terms had not changed and the Petitioner was required to hand over to the new officer by 31st October 2012. The Petitioner defied the directive. On 1st November 2012 the Petitioner proceeded on

leave without handing over thus gravely affecting operations of procurement section.

21. By failing to obey lawful orders, the Petitioner contravened the express terms of her employment contract and the human resource policies in place within the 1st respondent. This was contrary to section 44(3) and 44(4) (e) of the Employment Act.

On 22nd November 2012 the 4th Respondent did a detailed memo to the 2nd Respondent with details regarding the failure by the Petitioner to obey lawful instructions with recommendation of disciplinary action against her. On 26th November 2012 he held a meeting with the chairman of the disciplinary committee and the Petitioner with the purpose to hear the Petitioner on the issues in the memo of 22nd November 2012 and the handing over report. The Petitioner said she would not hand over to the interested party. The Respondent reserved the right to terminate the Petitioner without notice under the provisions of section 35(4) (b) for defying a lawful and proper command of her immediate supervisor. After the meeting the 2nd Respondent summarily dismissed the petitioner.

22. The Petitioner was not diligent I n her duties and on the performance rating, she never met expectations rank. On 3rd October 2012 the disciplinary committee recommended that the Petitioner be issued with a caution letter in view of her failure to provide guidance and direction in the process of the sale of Mercedes Benz KBG 140C; when the Petitioner went on leave the handover report shows pending and urgent tenders not done; there were over 40 LPOs pending as an indicator of ineptness by the petitioner; she submitted the Procurement Committee Minutes late; and work had to be redone due to the Petitioner failing to adhere to legal requirements of the PPDA. The Petitioner had several other incidences of incompetence where she submitted a draft copy of the Consolidated Annual procurement Plan for 2011/2012 financial year 3 months late; this report had glaring errors and in breach of the applicable law and regulations, and when she was asked to make corrections, she never fully did.

23. Mr Mukove also states that the officers of the 1st Respondent conducted procurement and disposal above board. When KNAO raised issues with the Respondent report, the Petitioner was the most senior officer in procurement to advise the 1st Respondent but she failed to do so. KNAO noted that the Respondent did not have the right personnel in procurement. On 17th October 2012 KNAO noted that procurement procedures were flouted in the Shelter Afrique partitioning and this was due to the negligence of the petitioner. As the most senior procurement officer, he Petitioner was negligent in her duties hence the negative comments by KNAO. The show cause letters issued to the Petitioner in this regard were justified. The letter dated 24th October 2012 as issued to the Petitioner following recommendations from the disciplinary committee that had noted serious lapses in the tendering process for sale of motor vehicle; by letter dated 1st March 2012 the Petitioner was being asked to submit the auditor's report while letter dated 17th February 2012 was a warning letter about the petitioner's conduct in obstructing the ILO auditors as directed by the 1st respondent.

24. By memo dated 12th October 2011 the Respondent noted that a number of LPOs were issued after the services were rendered instead of before the services were provided. The Petitioner had custody of the LPOs and thus responsible for the anomaly. These incidents demonstrate that the petitioned was incompetent, insubordinate, rebellious and defiant and was unwilling to obey lawful commands issued by her superiors. She flouted procurement rules and regulations. The Petitioner was given time to change but failed to abide or improve.

25. The incidents cited about corruption are not true and not supported by any evidence. The hiring of the interested party was done within procedure. The Petitioner participated in preparing the memos leading to the recruitment hoping she would take the position of head of procurement. In the end, the Petitioner acted unprofessionally when she refused to hand over to the new head of procurement in utter disregard to lawful directions. She proceeded on leave when the new officer reported without a handing over report. The allegations against the 3rd Respondent are therefore malicious. Allegations against the interested party have no bearing as he was competitively recruited and based on the various job scales of the 1st respondent, he was appropriately placed and remunerated. The Petitioner cannot claim remuneration

outside her contract of employment which gave her the terms and conditions of employment.

26. The Petitioner was never demoted. Her duties and responsibilities changed due to the appointment of the interested party but her terms and conditions of employment remained the same. On 21st November 2012 the Petitioner was still an employee of the Respondent enjoying full benefits including medical cover and where there were complaints, she should have followed the correct channels. As the chief officer of the 1st respondent, he cancelled the trainings the Petitioner was to attend due to exigencies of work and particularly as the Petitioner had refused to do handing over to the new officer and head of her department and work would not proceed if she was allowed to travel without formally handing over. It was upon his discretion to cancel, reschedule training or recall employees on leave if the exigency at hand so required. The Respondent adhered to rules and regulations of Public Finance and have all books of accounts audited every financial year.

27. The Petitioner was therefore dismissed for a lawful cause following the application of the human resource policies and sections 44(3) and 44(4) of the Employment Act. There were no rights violated. The Petitioner misconducted herself warranting the summary dismissal. She had a caution letter and various memos noting her incompetence. She constantly broke the law on procurement. The Petitioner is therefore not entitled to any of the remedies set out in her petition.

Interested Party's case

28. The interested party, Felix Chelimo was enjoined in the suit by the Petitioner on the basis that the outcome of the suit will have a direct bearing on his position as Head of Procurement in the 1st respondent. In response to the petition, Mr Chelimo stated that on 15th June 2012 he saw an advertisement on print media by the 1st Respondent inviting applications for the position of head of procurement and he expressed interest as he had the necessary qualifications. He is also a Supplies practitioner licenced by the Kenya Institute of Purchasing and Supply and a member of the Kenya Institute of Supplies and Management and has over 18 years work experience. He was invited for an interview and later offered the position of Head of Procurement vide letter dated 24th August 2012.

29. Following his appointment and posting, Mr Chelimo as head of procurement, all staff in the department were under his supervisor and with his long history and experience in his work, the allegations made against him by the Petitioner are only meant to show him in bad light, are scandalous and malicious. The Petitioner acted with contempt and disregard to his authority in the conduct of her duties. She never took instruction kindly.

30. Mr Chelimo also states that he cancelled the advertisements for tenders as done by the Petitioner on the grounds that, the request for proposal was advertised directly without the initial expression of interest of consultancy services was done which was in violation of section 78 of the PPDA; the bidders were given 15 days to Respondent to the tender instead of the required 21 days which was in violation of section 40 of the PPDA and the regulations thereto; the request for proposals was advertised directly without prior approval by the tender committee which was in violation of paragraph 8.3 of the Public Procurement and Disposal General manual, 2009.

31. Mr Chelimo also states that the duties of the Petitioner were reviewed as a matter of course following his appointment and largely due to the fact that the 1st Respondent delinked the procurement unit from the Human Capital development and Administration division. Such review did not compromise the terms and conditions of service. The petition is therefore filed in bad faith and should be dismissed with costs.

Submissions

32. The parties herein addressed the petition by their written submissions. The Petitioner filed her bundle on 5th February 2016; a reply to the respondents' bundle on 4th May 2016; and a reply to the interested party on 24th May 2016. The Respondents and interested party both filed their written submissions on 17th March 2016.

Petitioner submissions

33. The Petitioner submitted that as a procurement professional and member of KISM and holder of MSc Procurement Degree, a Masters and graduate in Purchasing and Supply, she applied for the position of Senior Procurement Officer as the head of procurement unit as advertised by the 1st Respondent on 23rd April 2010. Upon interview, on 12th October 2010, the Petitioner was offered the position. For all intents and purposes, the Petitioner was the head of procurement unit with the 1st Respondent pursuant to the provisions of sections 26(5) (b) of the PPDA and regulation 8(3). The Petitioner was confirmed in her position on 19th August 2011.

34. On 15th June 2012 the 1st Respondent advertised for the position of head of procurement, the 2nd Respondent prevailed upon the Petitioner to apply and upon interviews the interested party was hired. The Petitioner was demoted and her job changed and paid lower than the interested party. On 26th November 2012 the Petitioner was informed that her application as head of procurement was unsuccessful; she was cautioned for being negligent and warned of stern disciplinary action. On the same date, the Petitioner was summarily dismissed from her employment.

35. The Petitioner submit that the 2nd, 3rd and 4th Respondents are properly enjoined in this petition pursuant to Rule 5(a) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which defines who a ‘respondent’ should be – *a person alleged to have denied, violated or infringed, or threatened to deny, violate or infringe a right or fundamental freedom*. A Petitioner is allowed to enjoin several Respondents in order for the question as to liability, the extent, may be determined efficaciously and noting that every public officer is accountable for his or her administrative acts and as held in **Rose Wangui Mambo & 2 Others versus Limuru Country Club & 17 Others [2014] eKLR**, where the Court held that;

..... a person who alleges (not ‘proves’) that his fundamental rights have been contravened has a constitutional right to seek redress in the High Court. It would amount to grave injustice to lock out a Petitioner from filing his claim purely because the Respondent believes that the claim has no merit.

36. The Petitioner submit that the responses made by the 2nd Respondent on behalf of the 1st, 3rd and 4th Respondent without their authority is incompetent. A person acting for a corporation must satisfy that he is its officer and has authority under the corporate seal as held in **Solarstica Nyaguthii Muturi versus Housing Finance Co. Ltd [2011] eKLR**. The Replying Affidavit on the 2nd Respondent in response to the petition is therefore not admissible. There is no reply by the 1st, 3rd and 4th Respondents to the petition. Under the Rules, the Court has to proceed and determine the petition against the 1st, 3rd and 4th Respondents noting they have not challenged it.

37. The Petitioner also submit that the Court has jurisdiction to determine the violation of fundamental rights and contravention of the Constitution pursuant to article 162(2) (b) of the Constitution and section 4 of the Employment and Labour Relations Court Act. In **USIU versus AG & 2 Others [2012] eKLR**, the Court held that the Court has jurisdiction to deal with rights and fundamental freedoms howsoever arising from relationships defined in section 12 of the of the Employment and Labour Relations Court Act. In this case, the Petitioner was dismissed by the 2nd, 3rd and 4th Respondents without the sanction of the 1st respondent. Even though the 1st Respondent had the right to discipline the petitioner, there was a violation of section 5(3) (b), 43 and 45(1) and (2) of the Employment Act. The Respondents were required by law to give the Petitioner valid reasons for the dismissal as held in **G M V versus**

Bank of Africa (Kenya) Limited [2013] eKLR.

38. The Petitioner also submitted that Respondents have contravened her right to human dignity pursuant to article 28 of the constitution. Upon dismissal, the Petitioner have unreasonably refused and failed to pay her terminal dues. Failure to pay dues is an unfair labour practice and a breach of the Constitution

duty to respect human dignity as held by the Court in **Prof Elijah Biama versus University of Eldoret & 2 Others [2014] eKLR**. The Respondents have also violated the right to freedom and security of the person secured under article 29 of the Constitution when the Petitioner was subjected to malice and termination due to her zeal to comply with the PPDA. This treatment subjected the Petitioner to inhuman and degrading treatment when she was demoted, paid less for doing her work effectively despite collusion by the Respondents to defeat the ends of justice through corruption. When the Respondents failed to give the Petitioner with information she required in order to challenge their actions, this amounted to a violation of her right to access information under article 35 of the constitution.

39. The Petitioner also submitted that the Respondents violated her right to fair labour relations and fair administrative action as under article 41 and 47 of the Constitution as held in the case of **George O Akuti versus G4S Security Services Kenya Ltd [2013] eKLR**. Upon her termination from employment, the Respondents have neglected to pay the Petitioner her dues contrary to her right to protection as a public officer secured under article 236 of the constitution. The Petitioner is therefore entitled to the remedies sought. An amount of KShs.7 million should be awarded as compensation for the contravention of constitutional rights.

Respondent's submissions

40. The Respondents submit that on 25th August 2010 the Petitioner was competitively recruited and appointed as the senior procurement officer by the 1st respondent. She was under a contract of service until her dismissal and remained under Job Grade 5. The post of head of procurement unit was a new position created in 2012 and ranked as Job Grade 3. The new position was created upon a proposal by the Petitioner by delinking procurement function from the human capital development and administration division so as to report directly to the chief officer.

41. On this basis, the 1st Respondent board made a resolution to hire the new officer and on 15th June 2012 an advertisement was done where the Petitioner was one of the applicants. She was not successful and the interested party was hired while the Petitioner retained her position and due to the appointment of the new officer, her duties and responsibilities were changed but the terms and conditions of employment remained unchanged.

Upon the appointment of the interested party, the Petitioner was directed to do a hand over which she failed to do by 10th October 2012. A reminder was done on 12th October 2012, but she failed to comply. Subsequent to the same appointment, on 12th October 2012, the appointment of the Petitioner as secretary to the tender committee of the 1st Respondent was revoked as section 26(5) (b) of the PPDA required that the most senior procurement officer hold that position. On 22nd October 2012 the Petitioner protested these changes alleging that she had been demoted and her constitutional rights violated which was not the case. She also refused to do her hand over as directed. On 1st November 2012 the Petitioner proceeded on leave without handover and thus gravely affecting the procurement unit. The Petitioner had therefore failed to follow lawful instructions thus fundamentally was in breach of clear terms of her contract of service and the human resource policies of the 1st respondent.

42. On 22nd November 2012, the 4th Respondent did a memo to the 2nd Respondent with details of the petitioner's misconduct and recommended disciplinary action be taken against her. On 26th November 2012 a meeting was held with the Petitioner where she refused to do the handover. This was found to be gross misconduct and in breach of her contract and contrary to section 44(3) and (4) of the Employment Act and the Respondent summarily dismissed her from her employment.

43. The Respondent submit that the procedures taken in dismissing the Petitioner were lawful and within the allowed mandate under the human resource policy manual. The constitutional invocation in this case cannot suffice as held in the case of **GMV versus Bank of Africa Kenya Limited [2013] eKLR** that employee should not claim multiple remedies arising from the same wrongdoing. That every day disputes should not be characterised as constitutional violations as held in **Alex Malikhe Wafubwa & 7 Others**

versus Elias N Wamita & 4 others [2012] eKLR. Such litigation should address the specific legislation such as the Employment Act and not the underlying constitutional right which becomes the primary means of giving effect to the right.

44. The Respondents also submit that the case herein relate to unfair dismissal and the application of the constitutional violations only conflate the issues. The Employment Act addresses cases of summary dismissal which the claimant should have used instead of filing a petition. Had the Petitioner been appointed the head of procurement she would not have filed this petition as her case related to an unsuccessful applicant not keen on fair competition.

45. The Respondents also submit that there was no violation of any constitutional right to warrant the remedies sought by the petitioner. The Petitioner was unsuccessful in her job application as head of procurement but retained her position as senior procurement officer as held in **Joseph M Mbeeria & another versus Cabinet Secretary for Education, Science & Technology & 2 Others [2014] eKLR**, that in order to promote public trust, non-discrimination, equity, equality and social justice, all public appointments should be undertaken in an inclusive, competitive, accountable and transparent process. In a new job/positon, it would require an advertisement, short listing for interview and conducting interviews in accordance with set provisions. Even where the incumbent is seeking re-appointment, a vacant position must be subjected to the appointment process. This findings of the Court in the above case also relate to the application of article 10 and 232 of the constitution.

46. In this case, the action of the 1st Respondent advertising for the position of head of procurement and conducting interviews where the Petitioner participated was meant to achieve an inclusive, competitive, accountable and transparent process. This process is similar to what the 1st Respondent does in all open positions. This process did not violate section 5(8) (c) of the Employment Act or any rights under article 28,

29, and 41 of the constitution. The 1st Respondent acted within the confines of its human resources procedures manual and the Employment Act. The office of KNAO did not indict the 1st Respondent in this regard and the recruitment of the interested party to fill the new position of head of procurement was procedural with the full knowledge and participation of the Petitioner as an applicant who was not successful.

47. On the remedies sought, the Respondents submit that in seeking an order for specific performance, a party must demonstrate the exceptional circumstances of her claim that cannot be compensated by way of damages as held in **Anne Kinyua versus Nyayo Tea Zone Development Authority & 3 others [2012] eKLR**. In this case, the Court declined to order a reinstatement noting that, where the Petitioner was successful, an order for damages, compensation and payment of salaries and allowances due would be awarded under section 49 of the Employment Act. That the petition should be dismissed with costs.

Interested party submissions

48. On his part, the interested party submit that he was lawfully employment by the 1st Respondent as head of procurement unit in an open and transparent process. He is properly and fully qualified for the position. The 1st Respondent advertised for the position of the head of procurement in the print media where the interested party applied, was called for the interview and offered the position. There was a competitive process. The Petitioner has confirmed that her position was that of senior procurement officer and the orders sought for reinstatement as head of procurement has no basis as such position is not vacant.

49. The interested party also submit that the orders sought of reinstatement is regulated under section 12(3) of the Employment and Labour Relations Court Act, which order cannot be made after 3 years since the date of dismissal. The Petitioner was dismissed on 26th November 2012 and it is now over 3 years since. There are no exceptional circumstances for the grant of the order of reinstatement as required under section 49(4) (d) of the Employment Act. The position of head of procurement is not vacant for the Petitioner to be returned to the position she has insisted upon.

50. The interested party also submit that the Petitioner has admitted to disobeying lawful orders on the grounds that her constitutional rights were violated and therefore she could not comply with the direction to hand over to the head of procurement as directed by the officers of the 1st respondent. Such admission of failure to abide with lawful directions does not warrant the grant of the orders sought as it would not be practical to work with the petitioner.

51. The interested party also submit that the Court has no jurisdiction over the matter as held in the case of **Silas O Misawa versus Anne Mikoyo & 7 Others [2015] eKLR** where the Court found that it had no jurisdiction to determine a petition as there was no employment relationship[between the parties. In this case, the constitutional provisions set out by the Petitioner have no bearing in the case and should be dismissed with costs.

Determination

Whether the Court has jurisdiction

Whether there is misjoinder of parties

Whether there are constitutional violations

Whether the Petitioner is entitled to the remedies sought

52. The Respondents in their pleadings raised the issue of jurisdiction but failed to make any submissions on the issue. That notwithstanding, the question of jurisdiction is important to address first before resolving the other issues.

53. The Bill of Rights set out under the constitution, 2010 creates the right to fair labour relations as a non-derogable right. Under the constitution, it is also recognised that an employee has the right to fair labour relations, right to fair remuneration and reasonable working conditions set out under article 41 of the Constitution thus;

(2) Every worker has the right—

(a) to fair remuneration;

(b) to reasonable working conditions;

54. In this context, any employee or employer, trade union or workers association within the relationships set out under section 12 of the Employment and labour Relations Court Act, where aggrieved by the actions of any person, entity or both, in the context of any constitutional violation(s) has recourse before the Court established under article 162(2) - the Employment and Labour Relations Court. Parliament is also directed under Article 162(3) of the Constitution to enact legislation setting out the jurisdiction and functions of the Court(s) contemplated under sub-article (2), and with that, the Employment and Labour Relations Court Act is now in place in that context.

55. The question as to whether a fundamental right under the Constitution has been violated or a party has failed to ensue such a fundamental right or fair administrative procedure has not been followed in an employment and labour relations relationship, and the subject dispute relates to employment and labour relations, such is a dispute directly within the jurisdiction of the Employment and Labour Relations Court. to separate the issues and urge the Court not to find otherwise would be to defeat the ends of justice as held in the case of **United States International university (USIU) versus The AG & 2 Others, petition No.170 of 2012.**

56. Both parties admit that the Petitioner had a relationship with the 1st Respondent from the contract of employment that commenced on 25th August 2010 as the senior procurement officer. the 1st Respondent

was the employer while the 2nd Respondent as the chief officer of the 1st Respondent had overall responsibility to manage the daily affair while the 3rd and 4th Respondents played different roles in the context of the petitioner's employment. The interested party is also enjoined herein as the officer employed by the same employer, the 1st respondent. Parties herein are therefore interlinked by employment under the 1st respondent. The petition herein relates to violations of the petitioner's rights under the Constitution and particularly under the Employment Act based on the summary dismissal letter issued by the 2nd Respondent as the chief officer of the 1st Respondent on 26th November 2012. Such violations where alleged, the Employment and Labour Relations Court is the forum to articulate such matters.

57. The challenge to the jurisdiction of the Court lack merit.

58. On the question of misjoinder of parties, as the Petitioner has rightly submitted, which I agree, where there is a challenge to any constitutional violations, the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 now regulate procedures a party can take when filing a petition such as this one as required under article 22 of the Constitution particularly these rules as contemplated under article 22(3) of the constitution. The Rules allow a Petitioner to enjoin in a Petitioner any party as a Respondent here such a party is alleged to have denied, violated or infringed or threatened to infringe a right or fundamental freedoms of the petitioner. In **Dr Kizito Lubano versus KEMRI & Others, Petition No.47 of 2015** the Court held that where it is necessary to enjoin a party so as to effectively determine the matters in issue, a Petitioner shall not be denied such right so enjoin. The Court went further and set out that;

... Where the Court is satisfied that there is a case against the Respondents before court, such a case must be addressed on its merits. This Court recognises that employment and labour relations operate in an intricate manner and in a majority of cases, an employee will know who their supervisor is and might never know how the entity under which they work under is legally registered, even where the case was the converse and such an employee has all the requisite details, fair labour relations dictates that the Court operate without undue regard to technicalities and ensure substantive justice.

59. All the Respondents herein have been clearly defined with the allegations against each being set out. I therefore find that for the ease of determination of the matters herein, the respondents, though all are officers of the 1st respondent, they are properly enjoined and shall not suffer any prejudice.

60. The Petitioner also submitted that the 3rd and 4th Respondents have not given authority to the 2nd Respondent to appear on their behalf and failure to do so renders the petition against them not challenged. My reading of article 159 of the Constitution

in its entirety together with section 20 of the Employment and Labour Relations Court Act requires this Court to act and address substantive justice and not overly dwell on technicalities. That however does not remove any other Respondents from any responsibility conferred upon them under the Constitution or any legislative framework to act as officers of the 1st Respondent and ensure at the individual the protection, respect and guarantee of the constitutional rights due to the petitioner. Despite the 2nd Respondent filing the supporting affidavits in reply to the petition herein and letters of authority lacking from the other respondents, such act does not abet the duty and responsibility due from the requisite officers and or their office.

61. Concerning the petitioners rights under the Constitution and whether they were violated by the respondents, the petition is that articles 1(3) (C), 2(1) and (4), 3(1), 19, 20(3) and (4), 21(1) and (3), 22(1) and (20)(c), 23(1) and (3), 159, 162, 165, 258, and 259 have been violated. The petition is also that fundamental rights and freedoms under article 19, 20, 21, 24, 25, 27, 28, 29, 35, 41, 47, 50 and 236 have been contravened by the Respondents and they have further violated the provisions under articles 1, 3, 10, 73 and 232 of the constitution. The Petitioner is therefore seeking various declarations based on the violation of her constitutional rights setting out that she was discriminated against by the respondents; the

actions of the 1st Respondent and its officers the 2nd to the 4th Respondents in terminating the employment of the Petitioner were unlawful, illegal and unfair; and that due to the violations the Petitioner is seeking for reinstatement back to her position as head of procurement with the 1st respondent, compensation and payment of damages.

62. Article 10 of the Constitution provides;

10. (1) The national values and principles of governance in this

*Article **bind all State organs, State officers, public officers and all persons whenever any of them—***

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

[emphasis added].

63. In the same vein, article 73 of the Constitution provides;

73. (1) Authority assigned to a State officer—

(a) is a public trust to be exercised in a manner that—

(i) is consistent with the purposes and objects of this Constitution;

(ii) demonstrates respect for the people;

(iii) brings honour to the nation and dignity to the office;

and

(iv) promotes public confidence in the integrity of the office; and

...

64. I have set out the above provisions of the Constitution in order to place them in the context of the cited violations in the petition. The Respondents on their part have submitted that there are no constitutional violations, the context of the dispute herein is the dismissal of the petition and such is regulated under the Employment Act and the text of the Constitution should not be relied upon for interpretation of the matter at hand.

65. The 1st respondent, a state corporation established under the Insurance Act and its officers have a public duty to act, promote, protect and ensure compliance with the tenets of the Constitution guided by the values set out under article 10 and 73 while undertaking such duties. The principles set out under article 10 of the Constitution are broad in content and context to ensure each public officer, individual or entity is able to enjoy its protections. Such principles should not be seen as restrictive, rather should be seen in their ordinary and literal meaning as these are the aspirations of all Kenyans as held in the case of **Njogu versus the AG, Criminal Application No.39 of 2000.**

66. In this case, whatever action that the Respondents did, must not only be reviewed by the Court in the context of the violations cited above, but the Court is also allowed to look at the legislative framework giving further meaning to the rights under the constitution. In the context of the employer-employee

relationship that the Petitioner had with the 1st respondent, reference must be made to the Employment Act and the provisions of section 12 of the Employment and Labour Relations Court Act.

67. In taking any action that has the potential to negate, infringe or in any manner violate the constitutional right of any person, including the petitioner, the respondents, individually and as public officers are bound at all time by the values under article 10 of the constitution. Where the Petitioner as an employee of the 1st Respondent is alleged to have misconducted herself while at work, article 41 and 47 were binding upon the officers of the 1st Respondent to act within fair labour practice and to ensure fair administrative action is taken in addressing such misconduct. Additionally, in employment and labour relations, termination of employment must be effected procedurally and be for substantive reasons. Even in the worst case scenario where summary dismissal is necessary, section 44(3) and (4) of the Employment Act which permit such sanction, is subject and on condition of an employer satisfying condition precedent set out under section 41(2) of the same Act. In this regard, section 45 of the Employment Act thus requires any employer, even a corporation such as the 1st Respondent to put in place internal mechanisms that address any employee misconduct administratively but within the law and in the context of constitutional rights to fair labour practices and fair administrative action. In this regard, the Respondent had the Human Resource Management policies and Procedures Manual, December 2009 (the HR Policy), which I find as a comprehensive document with regard to policies contemplated under section 5 (8) (c) of the Employment Act. Under section XI (3), (4) and (5) disciplinary measures, procerus and appeals are set out. These I find as reasonable steps that the Respondent pre-set to address any misconduct by its employees to ensure internal mechanisms of hearing and employee and as a safeguard to ensure justice to all parties faced with cases of misconduct. Such a HR policy therefore becomes imperative to make reference to in these proceedings.

68. Where an employee is dissatisfied with the internal administrative action taken or the eventual decision taken, whether under the provisions of section 44, 43 or 35 of the Employment Act with regard to summary dismissal, termination with specific reasons or termination upon notification, such an employee has an inherent right to challenge the legality, validity and the justice of such a decision before this court. The Court must then be satisfied that the employer acted on a genuine case of misconduct; that such a case was addressed fairly and justice accorded to the employee; and in addressing the misconduct if any, the legal safeguard to the procedures undertaken were protected as required under section 41 of the Employment Act.

69. The Petitioner was dismissed on 26th November 2012 vide letter of the same date and following a meeting held on this date with her, the 2nd Respondent and Policy Research and Development Manager, where the Petitioner is said to have refused to do handing over note to the head of procurement as directed. The 26th November 2012 is also significant in this case as this was the date the Petitioner was informed that she was unsuccessful in her application for the position of head of procurement; a meeting was held between the 2nd respondent, Robert Kuloba, the Chairman Disciplinary Committee, and the Petitioner and the subject was;

The meeting was called to discuss various disciplinary issues alleged against the officer vide memo dated 22nd November 2012 by the Human Capital Development Administration (HCDA).

70. In the ordinary and literal reading of the minutes of the meeting above, the *officer* under reference is not clear. However the meeting of the 3 officers of the Respondent concluded that;

The officer showed no remorse.

71. This was followed by a letter of termination of employment to the Petitioner with reference as follows;

I make reference to the meeting held this morning between yourself, Policy Research and Development Manager and myself where you confirmed that you had not handed over your duties to the head of procurement as instructed by the Human Capital and Administration manager.

72. This letter is signed by the 2nd respondent.

73. The *meeting held this morning* was this the same meeting as referred to under the minutes of the same date? Was this the meeting between the 2nd respondent, Robert Kuloba, Chairman Disciplinary Committee and the petitioner? Or were there two meetings where the Policy Research and Development Manager was present? My reading of the minutes and the letter of termination suggest two different meetings. However, even where the two set of documents refer to the same meeting, the meeting where Mr Kuloba was chairman of the Disciplinary Committee was between the 3 officers of the Respondent – 2nd respondent, Kuloba and the Petitioner. Who then was the subject *officer* of discussion?

74. The letter of termination refers to the reasons for which the Petitioner was dismissed;

That on 3rd October 2012, the Human Capital Development Administrator directed the Petitioner to prepare a handing over report by 10th October 2012 which the Petitioner declined to do;

That on 12th October 2012 the Petitioner was reminded to hand over and she failed to follow lawful instruction;

That on 26th October 2012 the Petitioner was informed that the hand over report from her was long overdue and should expedite the process by close of business 31st October 2012; and

That these actions of failure to obey lawful instructions contravened the rules and regulations of her contract of service and sections 44(3) and (4) of the Employment Act.

75. As a result of the above acts of alleged misconduct, the respondent, by virtue of section IX, clause 1.5.2 of the HR policy and section 44(3) and (4) of the Employment Act, summarily dismissed the petitioner.

76. Under section IX (1.5.2), the HR policy sets out the office of *failure to comply with an order, regulation or division instruction without sufficient reason* as an offence amounting to gross misconduct. Under section IX (3) the *disciplinary measures that can be taken include*;

1. *Warning*
2. *Recovery of an amount lost*
3. *Reduction of salary*
4. *Retirement in the public interest*
5. *Summary dismissal*

77. In this case, the sanction of *summary dismissal* relates to cases where the 1st Respondent is satisfied that an employee has breached rules and regulations governing the employee's employment or the Employment Act. However, before such a decision can be arrived at section IX (4) sets out the *Disciplinary Procedures* that the 1st Respondent must undertake;

1. The Human Capital Development Administrator upon receipt of a case of misconduct must draw up a statement or charge of the imputation of misconduct;
2. Statement should be forwarded to the subject employee to respond within 48 hours;
3. Upon receipt of the response, the supervising officer/ Human Capital Development Administrator should forward the same to the Human Capital Development Administrator with his

recommendation for action;

4. The Human Capital Development Administrator must examine both the charge and defence to determine if the employee is guilty and recommend the penalty or forward the case to the disciplinary committee;

5. Disciplinary committee is constituted where the employee is called to attend in person to defend self; and

6. On the recommendation of the disciplinary committee, The CEO or the Board of 1st Respondent must consider the decision of the disciplinary committee as dispose the case as appropriate. There is also the right of appeal.

78. I find these procedures as useful safeguards placed in the context of article 41 and 47 of the constitution. Where properly addressed and followed, the subject employee would be given a fair chance to be heard and administratively, whatever action is taken in the context of all the antecedent steps contemplated under the HR policy, fair administrative action would be secured. I also find the HR policy procedures comply to the provisions of section 41 of the Employment Act, as within all the contemplated steps/procedures, the subject employee is given a chance to give their defence which is given consideration at the first instance by the supervising officer, the Human Capital Development Administrator and where necessary the Disciplinary committee. Ultimately, where all these administrative procedures are undertaken, there is right of appeal.

79. Did the Respondents adhere to these procedures in the case of the petitioner? Going back, on 15th June 2012, the 1st Respondent advertised for the position of head of procurement, the Petitioner applied was called for the interviews but was only informed of the outcome of her application on 26th November 2012, on the date of her termination. On 3rd October 2012 the 3rd Respondent issued memo to the Petitioner directing her to hand over to the interested party as the Head of procurement by 10th October 2012. The 4th Respondent also shared an email on the induction of the interested party and other officers. On the same date [3rd October 2012] the Petitioner did a reply with regard to the induction and handover report to the 3rd Respondent margin a proposal that she be allowed to do the handover report once the interested party had been taken through induction as *procurement issues are sensitive*. The 4th Respondent seem to refer to the matter in the email dated 5th October 2012 directing the Petitioner to do the handover report by 10th October 2012. The Petitioner replied on 10th October 2012 noting that she was technically secretary to the Tender Committee by virtue of being head of procurement unit and unless this was revoked, she remained as such; her job description was head of procurement by virtue of her confirmation and in view of the directions to hand over she required job clarification before she could do any hand over. The Petitioner also requested to know if she had been demoted and or replaced as head of procurement.

80. On 12th October 2012, the 2nd Respondent wrote to the Petitioner revoking her appointment as secretary to the tender committee and directed that the Petitioner hand over to the interested party. On the same date, the 3rd responding wrote to the Petitioner noting the email dated 5th October 2012 and responding that the Petitioner had been appointed to the tender committee as she was the most senior officer in the procurement section and this had now been revoked by the 2nd respondent. The 3rd Respondent also reiterated to the Petitioner that she was the senior procurement officer.

81. On 22nd October 2012, the Petitioner wrote a detailed letter to the 3rd Respondent noting her frustrations of being replaced as head of procurement by virtue of her confirmation on the job and also setting out the violation of her rights under the Constitution and under the Employment Act and that the Respondents had also contravened the Public Officers Ethics Act. In response, the 3rd Respondent noted to the Petitioner that she was the senior procurement officer of the 1st Respondent and the office had not changed; there were changes due to the appointment of the interested party and was then required to hand

over by 31st October 2012. This letter had a caution to the Petitioner that if she failed to hand over as directed, this would be defiance of authority and be liable to disciplinary action in accordance to the HR policy.

82. On 22nd November 2012, the 4th Respondent did a memo setting out details of the petitioner's misconduct that amounted to breach of her contract and employment act pursuant to section 44(3) and (4). What appears next in the meeting set out above held on 26th November 2012 between the 2nd respondent, Robert Kuloba and the petitioner?

83. Following the memo by the 4th Respondent on **22nd October 2012**, the HR policy set out above required that this statement of charge and recommendation for disciplinary action against the claimant and the alleged misconduct and the details of each be sent to the subject employee, the petitioner, for her response within 48 hours. Upon the petitioner's response upon issuance of the 'charges' and statement of imputation of misconduct, such must be addressed by the supervisor or the Human Capital Development Administrator with recommendations for action. In arriving at the recommendation or action to be taken about the petitioner, the supervisor or Human Capital Development Administrator must put into account the 'charges' of misconduct and the responses made thereof by the employer, the Petitioner and then make a decision and forward the same to the disciplinary committee. At the disciplinary committee, the employee, the Petitioner must appear in person to defend herself before a decision is taken. On the decision, the same must make a recommendation for the CEO or the Board of the 1st Respondent to act upon. There is also the right of appeal.

84. Following the analysis above, it is apparent that the Petitioner as the senior procurement officer was supervised by the Human Capital Development Administrator and the charges against her vide memo dated 22nd November 2012 were prepared by the 4th respondent, the Senior Human Capital Development Officer and directed the memo to the 2nd respondent.

85. I have gone through the entire record, the various affidavits of the 2nd respondent, I find no evidence that this memo of 22nd November 2012 setting out the 'charges' of misconduct was sent to the Petitioner giving her the 48 hours required under the HR policy in terms of addressing misconduct. Even where the Petitioner may have been issued with this memo, she had 48 hours from 22nd to respond to the allegations set out. This would then have required the supervisor who in this case was the Human Capital Development Administrator to review the same and make a finding.

86. In this case, noting the issues at hand, that the complaint to the allegations of misconduct was the Human Capital Development Administrator against the petitioner, good industrial practice required that such be addressed by another party other than the officer likely to give evidence of misconduct against the petitioner. Such could have been escalated to the 2nd Respondent as the CEO or the appointment of another senior officer at the same level of the Human Capital Development Administrator. In terms of article 47 of the constitution, fair administrative action requires that;

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

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

At Article 47 of the Constitution therefore guarantees to everyone the right to administrative action that is expeditious, efficient, fair, lawful reasonable and procedurally fair, while article 41 of the Constitution guarantees everyone the right to fair labour practices. As at 26th November 2012, there is no evidence that the Petitioner had knowledge of the charges against her. When she was directed to do the handover report by 10th October 2012 there was a response that was acted upon by the 3rd Respondent setting out her position and the 2nd Respondent revoked her appointment to the tender committee. The direction to hand over was renewed to a new date with the last such being 31st October 2012 but the Petitioner still

contested several issues particularly her concern to her new work duties.

I therefore find, at the point of termination, on 26th November 2012, the Respondents had not complied with the HR policy, which as public officers required to exercise their authority in the context of principles and values set out under the Constitution article

10, they were bound to. Save for the non-compliance with the internal mechanisms set out under the HR policy of the 1st respondent, the Respondents in addressing any misconduct of the Petitioner were bound by the applicable law, section 41(2) of the Employment Act thus;

(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.

The ‘charges’ facing the Petitioner vide memo by the 4th Respondent dated 22nd November 2012 related to the violation of section 44(3) and (4) of the Employment Act. In reference to section 41 of the Employment Act, however gross the nature of misconduct an employee is alleged to have committed, the mandatory provisions of law must be adhered to. The employee must be given a hearing and where this is not practically possible, the duty is upon the employer to set out such exceptional circumstances as to why they could not give the employee a hearing before the summary dismissal. At the hearing, the employer must put into account the provisions of section 41(1) of the Employment Act thus;

41. (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. [Emphasis added].

The employee must be given a hearing in the presence of another employee of her choice. Such requirement is mandatory. Where the HR policy of the 1st Respondent omits this procedure, such is inconsistent with the mandatory provisions of the law and the law ranks in priority. Therefore the meeting(s) held on 26th November 2012 where the Petitioner was called by the 2nd Respondent with Mr Kuloba failed to meet the prerequisite mandatory provisions of section 41 of the Employment Act and the provisions of fair administrative action under article 47 of the constitution. Such are practices set out as unfair labour practices under article 41 of the Constitution and the right to fair administrative action is no longer a judicial review issue but a constitutional issue as well as held in **Republic versus County Government of Kiambu Ex Parte Robert Gakuru & Another [2016] eKLR the Court held;**

*It is therefore clear that the right to fair administrative action is no longer just a judicial review issue but a constitutional issue as well. As was appreciated in **Re Bivac International SA (Bureau Varitas) [2005] 2 EA 43** it is my view that it is no longer possible to create clear distinction between the grounds upon which judicial review remedies can be granted from those on which remedies in respect of violation of the and Constitution can be granted. Whereas the remedies in judicial review are limited and restricted, the grounds cut across both.*

I find in this case, the Constitution enjoins the court, at Article 23, to grant appropriate relief to a party who alleges violation of constitutional rights under Article 22. The failure to adhere to mandatory provisions of section 41 of the Employment Act amounted to procedural unfairness under the provisions of section 45 of the Act. The resulting decision, to summarily dismiss the Petitioner on the face of the constitutional and legal violations resulted into a decision that was flawed. Had the Respondent respected their own HR policy, acted with equity and bound by the principles under article 10 of the constitution, the harsh decision made against the Petitioner should never have been.

Remedies

The Petitioner has set out various declarations that she is seeking from the court. Noting the above analysis and the findings that the right to fair labour practice and fair administrative action were violated by the respondents, this shall be put into account in addressing the remedies sought.

The petition seeks a declaration that section 35(4) (b) of the Employment Act, 2007 which gives an employer the right to terminate a contract of employment without notice be declared inconsistent with the constitution. The subject section 35(4) of the Employment Act provides that;

(4) Nothing in this section affects the right—

(a) of an employee whose services have been terminated to dispute the lawfulness or fairness of the termination in accordance with the provisions of section 46; or

(b) of an employer or an employee to terminate a contract of employment without notice for any cause recognised by law.

My reading of the section is that the courts should adopt a purposive interpretation of the law in tandem with article 259 of the Constitution as to promote the purpose, values of the constitution, advance the rule of law and permit the development of the law. Section 35(4) of the Employment Act cannot be lifted and set apart from the rest of the Act or part or the entire section 35 for an interpretation of the same to suffice. The provisions of section 35(4) (b) must be placed in context and interpreted in whole and not alone. This was the approach taken by the Court of Appeal in **Thomas De La Rue (K) Ltd versus David Opondo Omulama [2013] eKLR** where the Court was invited by the appellant to interpret the provisions of section 40(a)(b) and the Court went ahead to address the context of the subsection by consideration of the purpose of section 40 of the Employment Act but also went ahead to give meaning to the provisions of both sections 40(1) (a) and the subject subsection 40(1)(b) of the Act.

In this case therefore, the parties to an employment relationship enjoy various rights. Section 35 of the Employment Act allow a party to an employment contract [employer or employee] to terminate the employment relationship by giving notice. the section parts are that where a contract of service has no termination clause, termination notice apply by operation of the law; the employment contract can set out the time limitation for a termination notice; where an employer has issued a termination notice to an employee, such an employer must explain its contents to the employee and ensure an understanding of the same; and under section 35(4), on the one hand, the employee has the right to dispute the lawfulness and fairness of the termination notice and the other part is that either party tot the employment contract have the right to terminate the employment contract without notice *for any lawful cause*. The last part relate to service pay upon termination. In this case therefore, section 35(4) operates for the benefit of both parties to an employment relationship and not to the employer only. The exception in the application of the rule is to ensure that the non-issuance of notice is *for a lawful cause*. Such a lawful cause is what in my view forms the content of section 43 of the Employment act where an employer must give an employee the reason(s) of termination otherwise without giving such reason(s) such a termination amounts to an unfair termination under section 45 of the Act.

As such, I find the provisions of section 35(4) (b) are not inconsistent with the other parts of the Employment Act or the constitution. The section should be seen in whole.

On the petition that the declaration of vacancy of the petitioner's position without consultation is null and void; that the recruitment of the interested party while the Petitioner was in office was an unfair labour practice and null and void; that the appointment of the interested party as head of procurement did not diminish the petitioner's right to occupy the office of head of procurement; and that the payment of the interested party of a higher salary was an act of discrimination against the Petitioner and she should be paid the difference as the same was in violation of her Constitution rights under article 27, 28, 29, 35, 41 and 47. From the ongoing, on 25th August 2010, the Petitioner was offered by the 1st Respondent the position of senior procurement officer. The Petitioner was also issued with her job description. These offer was accepted on 9th December 2011.

The Petitioner also confirmed that she was confirmed in her appointment upon successfully completing her probation on 24th August 2011. By application of section 26(4) of the PPDA read together with Regulation 10(1) of the Public procurement and Disposal Regulations, 2006 the Petitioner was appointed as secretary to the tender committee. The Petitioner continued to undertake her duties as such until 15th June 2012 when the 1st Respondent advertised for the position of head of procurement, which she applied for and was not successful vide communication by the 1st Respondent on 26th November 2012. I have gone through the entire record of the petition and the responses thereto by the Respondents and the interested party, I find the Petitioner remained the senior procurement officer of the Respondent until her dismissal on 26th November 2012. Such position was not changed by any letter of appointment or review of her terms and conditions of service under the letter of offer and job description issued and dated 24th August 2010. By dint of the Petitioner putting in her application for the advertised position of head of procurement, whether this was at the instance or insistence of the 2nd Respondent or not, the Petitioner made a choice to apply for this position and attended the interview for the same. Such application for consideration of the position of head of procurement did not affect the petitioner's position as senior procurement officer or diminish the job description under which she was appointed as under that appointment, the Petitioner was bound to give the 1st Respondent service for which she was appointed for as held by this Court in **Elizabeth Omoro versus Nairobi Bottlers Limited, Cause No.2493 of 2012** that an employee should not expect extra payment, bonus or consideration over and above the agreed upon salary under the employment contract as anything outside such an arrangement is discretionary. The claim that the employee had done so well in her job and therefore should be appreciated was found not to have basis as such an employee was expected by the employer to perform her duties exceptionally well. No award was made to appreciate the employee as that was found to be discretionary on the employer.

In this case therefore, the claim that the Petitioner was the head of procurement; that the position of head of procurement now held by the interested party should be vacated for her or that upon the appointment of the interested party the Petitioner was demoted, I find to have no basis. The Petitioner retained her position as senior procurement officer and such did not change until her dismissal. I find no legitimate expectation upon the Petitioner that while she remained the most senior procurement officer with the 1st Respondent and was appointed as secretary to the tender committee she became the head of procurement. Such an office of head of procurement was created with the knowledge of the petitioner, upon its advertisement, she placed her application and attended at the interviews. The reasons for her being unsuccessful aside, the Petitioner remained in her appointed position, with the same terms and conditions. The change in duties and responsibilities did not alter the core contents of her appointment – terms and conditions of employment remained unchanged.

The claims with regard to difference in salary payments; discrimination against the Petitioner on the basis that she was treated differently from the interested party in terms of remuneration; damages for demotion and change of terms without consent; and the claim that the Petitioner was subjected to indignity, I find to have no basis and no orders shall issue.

The Petitioner is also seeking to be reinstated back to the position of head of procurement. I find the Petitioner never held such a position of head of procurement with the 1st Respondent to seek the orders of reinstatement in that capacity. In the case of her held position of senior procurement officer, an order of reinstatement but be addressed in the context that section 12 of the Employment and Labour Relations Court Act, the legislative framework that gives this Court jurisdiction to order reinstatement, bind the Court to consider the same in the context that after 3 years from the date of dismissal, to direct a reinstatement would affect the employer operations. That the order of reinstatement should be given in very exceptional cases upon consideration of all factors. Even though the Petitioner came to Court in good time and may not have had control of the Court schedule so as to be able to address her petition before the lapse of the 3 years since her dismissal so as to enjoy the right of reinstatement and that the various officers of the respondent, 2nd, 3rd and 4th Respondents - in undertaking their public duty failed in a material way to protect the fundamental rights and freedoms of the petitioner, to take her back to the same environment would be to set her up for failure in a hostile work place. It is not lost to the Court that the 2nd respondent, without giving any explanation or notice, cancelled the various trainings the Petitioner

was to attend at various for a leading to massive losses to public resources. Even though this was at the discretion of the 2nd respondent, reason and prudence of his office dictated that that discretion be applied within reasonable limits. The 2nd Respondent had approved the trainings the Petitioner was to undertake, these were paid for and flight tickets issued, and the resulting losses were to the taxpayer. The Respondents made no efforts to give reasonable expiations as to why such had to happen. The only justification was that the 2nd Respondent had the discretion to cancel the trainings due to exigency of duty.

Had the 1st Respondent and by extension the 2nd Respondent informed the Petitioner that she was not successful in her application for head of procurement immediately the interested party was informed, knowing well in advance that the Petitioner had an interest in that position and having served as the most senior officer in procurement before the recruitment of the interested party, this petition should have been unnecessary. To therefore issue the Petitioner with the letter on the date of her dismissal is most brutal and should not be visited upon any other officer of the 1st respondent. Such an action negates the public duty bestowed upon the officers of the respondent, and the 2nd Respondent being the chief officer of the 1st Respondent is bound to act timeously, openly and in the context of article 10 of the Constitution – he should have informed the Petitioner of the outcome of the interviews for the head of procurement within a reasonable time.

An order of reinstatement shall not issue.

On the finding that the petitioner's right to fair labour practice and fair administrative action were violated by the respondents, damages are due. The Petitioner is awarded damages of kshs.1, 500,000.00

The failure to comply with mandatory provisions of section 41 of the Employment Act resulted in protrude unfairness. Had the Respondents addressed themselves to the legal procedures set out under the law before the summary dismissal, the same would have been unnecessary. The Petitioner was not allowed to argue her case and the sanction given of summary dismissal was most severe. The failure to apply correct procedure amount to unfairness under section 45 of the Employment Act, and compensation is due. The petitioner's last salary was Kshs.297.00 gross. The Court awards 12 months gross salary in compensation all amounting to Kshs.3, 564,000.00.

In a case of unfair dismissal, notice pay is due. Section 35 of the employment Act sets such notice as due in accordance with the termination clause in the contract of employment. The petitioner's contract of employment at clause 12 gave 3 months' notice period. The Petitioner is awarded notice pay all at Kshs.891, 000.00.

On the claim for salaries due until retirement at 60 years, I find that the contract of employment had a termination clause, to pay the notice due and then consider the retirement clause would be double payment. On the finding that there was unfair termination of employment, an appropriate award and compensation under section 49 of the Employment Act has been addressed. The prayer herein is declined.

Costs shall also follow cause. The Respondents shall jointly and severally meet the costs of the petitioner.

Judgement is hereby entered for the Petitioner against the Respondent in the following terms;

- 1) I declare the petitioners' constitutional right were violated by the respondent;**
- 2) I declare the Petitioner was unfairly terminated from employment with the respondent;**
- 3) Damages awarded at kshs.1, 500,000.00;**
- 4) Compensation awarded at kshs.3, 564,000.00;**
- 5) Notice pay at kshs.891, 000.00; and**

6) Costs of the suit to the petitioner.

Orders accordingly.

DELIVERED IN OPEN COURT AT NAIROBI THIS 30TH DAY OF MAY 2016.

M. MBARU

JUDGE

In the presence of

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