



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO. 47 OF 2015

KIZITO M. LUBANO PETITIONER

VERSUS

KEMRI BOARD OF MANAGEMENT 1ST RESPONDENT

DIRECTOR KEMRI..... 2ND RESPONDENT

MINISTER OF HEALTH..... 3RD RESPONDENT

PRINCIPAL SECRETARY, HEALTH..... 4TH RESPONDENT

ETHICS AND ANTI- CORRUPTION COMMISSION..... 5TH RESPONDENT

ELIZABETH BUKUSU..... 6TH RESPONDENT

ANNE WANG’OMBE..... 7TH RESPONDENT

ATTORNEY GENERAL..... 8TH RESPONDENT

COMMISSION FOR ADMINISTRATION OF JUSTICE 9TH RESPONDENT

JUDGEMENT

1. The petitioner, Kizito Lubano filed his Petition on 9th June 2015 challenging his dismissal from KEMRI and the violation of his constitutional rights under articles 10, 20, 27, 28, 24, 25, 29, 32, 33, 35, 36(1), 37, 40(3) (b), 41, 43, 47, 48, 50, 59, 73, 75, 76, 77, 79, 201, 232, 236, 249, and 252 of the constitution. In reply the 1st and 2nd respondents filed a Replying Affidavit on 24th June 2015 sworn by Margaret Rigoro the legal officer. The 7th Respondent also filed a Replying Affidavit on 1st July 2015. The 3rd, 4th and 8th respondents filed their Grounds of opposition on 6th July 2015. The 9th Respondent also entered appearance herein and has filed their responses.

2. The background to the Petition is that the Petitioner was employed by KEMRI as the Principal Research Officer and Head of Planning, Monitoring and Evaluation Department. The 1st Respondent is sued as the manager of KEMRI, a state corporation and the 2nd Respondent is the Chief Officer and director of KEMRI while the 3rd Respondent is the parent ministry and the 4th Respondent the responsible officer at the 4th respondent. The 5th Respondent is joined in their capacity as a constitutional commission responsible for ensuring compliance with and enforcement of the provisions of chapter 6 of the

constitution. The 6th Respondent was the supervisor of the petitioner; the 7th Respondent is the head of human resource at KEMRI; the 8th Respondent is the legal government advisor; and the 9th Respondent is an independent commission on administration of justice.

The petition

3. The Petitioner is seeking the following orders;
 - a. *A declaration that within the intendment of Article 10 of the Constitution and resonating the intention of Article 201(a) of the Constitution the 1st, 2nd, 3rd, 4th, 6th and 7th respondents are bound to discharge their public duties in an open and transparent manner;*
 - b. *A declaration that within the intendment of Article 47(1) and 50 of the Constitution the 1st, 2nd, 3rd, 4th, 6th and 7th respondents cannot remove the Petitioner from his position as the head of the monitoring and evaluation department without giving him an adequate opportunity to defend himself from the allegations in accordance with the rules of natural justice;*
 - c. *A declaration that within the intendment of Article 28, 41(1) and (2)(a), 47 of the Constitution the 1st, 2nd, 3rd, 4th, 6th and 7th respondents cannot unilaterally freeze the petitioners' salary without communication and due administrative process;*
 - d. *A declaration that within the intendment of Article 28, 41(1) and (2)(a), 47(1) of the Constitution the 1st, 2nd, 3rd, 4th, 6th and 7th respondents cannot arbitrarily remove the Petitioner from the position of the head of planning, monitoring and evaluation for which he had been competitively recruited following a newspaper advertisement without a hearing;*
 - e. *A declaration that within the intendment of Article 47(2) of the Constitution the 1st, 2nd, 3rd, 4th, 6th and 7th respondents cannot take administrative actions without giving valid reasons for the same;*
 - f. *A declaration that within the intendment of Article 236 of the Constitution the 1st, 2nd, 3rd, 4th, 6th and 7th respondents cannot victimise the Petitioner for having discharged his public duties;*
 - g. *A declaration that within the intendment of Article 59(4), 79, 248, 252 of the Constitution the 5th and 9th respondents are bound to carry out their constitutional mandate and obligation to any member of the public notified of improprieties within government bodies;*
 - h. *A declaration that within the intendment of Article 73(1)(a) of the Constitution the respondents are bound to exercise their powers as a public trust consistent with the purposes and objects of this Constitution demonstrates respect for the people brings honour to the nation and dignity to the office and promotes public confidence and the integrity of the office;*
 - i. *A declaration that within the intendment of Article 73(2)(b) of the Constitution the respondents are bound to be objective and impartial in decision making and to ensure that decisions are not influenced by favouritism, other improper motives or corrupt practices;*
 - j. *A declaration that within the intendment of articles 73(2)(c), 75, 76 and 77 the 1st, 2nd, 3rd, 4th, 6th and 7th respondents are bound to declare their personal financial and other conflicts of interest with their public duty;*
 - k. *A declaration that the recommendation for the dismissal of the Petitioner is in contravention of articles 25, 50, and 47 of the Constitution and does not meet the threshold set in section 44(4) of the Employment Act, 2007 and Regulations 14.5 and 13.25 of the KEMRI staff regulation and KEMRI Human Resource policy and Procedures Manual;*
 - l. *And order of judicial review in the nature of certiorari due to issue to bring into the Court for purposes for quashing the decision of the 1st Respondent dismissing the Petitioner for being illegal and unconstitutional;*
 - m. *And order of judicial review in the nature of mandamus does issue compelling the 1st Respondent to reinstate the Petitioner to his former position as Principal Research Officer and Head of KEMRI Planning, Monitoring and Evaluation Department;*
 - n. *And order for compensation for general and exemplary damages to compensate the Petitioner for the harassment, financial constraints, intimidation, defamation and mental torture he has suffered resulting from the unfair and unconstitutional dismissal;*

- o. *A permanent injunction against the respondents stopping them from undertaking any disciplinary process against commencing any further disciplinary action against the Petitioner based on the same faulty allegation relied upon in the impugned process; and*
- p. *The costs of the Petition be borne by the respondent.*

The Petition

4. The background to the Petition is that the Petitioner was formerly employed by KEMRI as the Principal Research Officer and head of the Department of Planning, Monitoring and Evaluation where he performed his duties diligently and as part of his work since 2008 he was involved in continuous surveillance, collection and analysis of information necessary for effective stewardship of KEMRI.

5. The Petition is therefore that the Petitioner was then dismissed from his position on false allegations and on a faulty administrative process. That the KEMRI board used the disciplinary process to coerce the Petitioner to change the shareholding in KEMRES Ltd, registered as a private company limited by shares contrary to the Companies Act and members of the 1st Respondent became the directors. Other allegations made against the Petitioner which he has challenged are that he did not disregard any official communication to him and the disciplinary committee relied on matters that are in Court in case No.493 of 2013 instituted by the 6th respondent, Elizabeth Bukusi. that the Petitioner asked for better particulars of allegations against him but was not provided with such; the allegation that he was absent from work without permission was not correct as such absence was explained; he was present at the Performance Contracting meeting but obtained permission to be absent; the Petitioner was unfairly accused of providing information to the offices of the Ombudsperson and the 5th respondent; and that the composition of the disciplinary committee hearing his case constituted the 6th Respondent who had already filed a case against the Petitioner and was pending in court. Other parties in the committee had vested interests in the disciplinary process, the 6th Respondent had colluded with the 7th Respondent to write adverse letters against the Petitioner and illegally stopping his salary. The Petition is also that the Petitioner was unfairly treated when the disciplinary committee held that he had the burden to prove that the allegations against him and in making conclusion that he should be retired on public interest without disclosing such matters in the allegations or proceedings was therefore wrong.

6. Before his dismissal, the Petitioner had brought to light abuses of power and maladministration at KEMRI leading to his being obstructed from performing his duties. Since his employment, the Petitioner has been the subject of provocation, bias, discrimination, jealousy and resentment and the 6th Respondent had been insensitive to his department activities and therefore did undermine, micromanage, and bypass the department despite the critical role it does play for KEMRI. From 2011, the 6th Respondent had been indifferent to the Petitioner and his work; in May 2013 the 6th Respondent held a retreat for staff for review of the organisational chat and performance appraisal but left out the petitioner's department; the Petitioner wrote to the 1st Respondent but was ignored; on 5th August 2015 the 6th Respondent excluded the Petitioner from a strategic planning meeting; and later the Petitioner led a team to develop the strategic document focusing on devolution and was adopted with approval by KEMRI.

7. The petitioner, in the course of his work at KEMRI learnt that the 6th Respondent was running an NGO with a project RCTP-FACES and was a co-director contrary to government regulations. This NGO was awarded \$7 million (Ksh.560 million) in 2010. This can explain why the Petitioner was removed from the planning meetings and why he received a letter on 11th September 2013 for gross misconduct following an Article in the newspapers which he had not authored and another letter dated 16th September 2013 after raising concerns with regard to the strategic planning. These were efforts to remove the Petitioner from KEMRI. In January 2014 the Petitioner received a letter that he had been removed as head of his department which was taken over by the 6th respondent; there was a disciplinary hearing on 29th March 2014 and 4th April 2014; there is a pending defamation suit filed by the 6th Respondent against the petitioner; and these facts notwithstanding the disciplinary case was determined with the dismissal of the Petitioner on 17th December 2014 by retirement on public interest.

8. To help resolve the matter, the Petitioner held a meeting with the 4th Respondent on 5th January, 9th February and 23rd February 2015 was advised that he would be reinstated but further attempts to engage have been unsuccessful. Internal mechanisms thus exhausted, the Petitioner has moved the court.

The 1st and 2nd respondent's case

9. The 1st and 2nd respondents case is set out in the Replying Affidavit by Margaret Rigoro filed on 24th June 2015 presented their case as the Legal Officer of KEMRI. The Petitioner was employed by KEMRI which is a state corporation established under the Science, Technology and Innovations Act and KEMRI as a body corporate with perpetual succession, has power to sue and be sued in its own name. The Petitioner was retired on 17th November 2014 following an employment dispute of which the 3rd and 9th respondents were not parties and hence not proper parties in this matter and herein wrongly enjoined. The Petitioner was an interested party in Petition No.33 of 2014 and a ruling was delivered on 30th July 2014; there is an appeal application filed in Civil Application No. 26 of 2015 before the Court of Appeal and due for hearing on the grounds of stay pending appeal; and that these matters address issues similar as herein. There is also an appeal that has since been filed which has a nexus with the proceedings herein where the Petitioner is a party supporting the appeal. The proceedings herein should be stayed pending the hearing and determination of the Appeal now pending before the Court of Appeal to avoid conflicting decisions on the same subject matter.

10. The case is also that on diverse dates KEMRI received a number allegations and complaints against the petitioner, he was given warning letters and thereafter the 1st Respondent commenced disciplinary action in strict compliance with the procedures. The disciplinary committee summoned the Petitioner to respond to the allegations and complaints against him; the committee deliberated over the matter and on 28th April 2014 a recommendation was made to retire the Petitioner on public interest. The 1st Respondent also met to deliberate over the disciplinary committee recommendation on the petitioner, it adopted the committee recommendation that led to the retirement of the Petitioner on 17th November 2014.

11. The case is further that upon the retirement of the Petitioner all tasks he previously had were taken up by other officers working within KEMRI. There are regulations with elaborate clearance process relating to benefits after termination or retirement after employment. the current Petition has been made in bad faith as there is a pending matter before the Court of Appeal over the same issues as herein; the termination of the petitioner's employment was done in accordance with his employment contract; unnecessary parties have been enjoined; and the Petitioner has come to Court with unclean hands.

3rd, 4th & 8th respondents Case

12. The above respondents filed grounds of opposition to the Petition on 6th July 2015. The Petition is opposed on the grounds that there is a misjoinder of the respondents herein in that the 3rd, 4th and 8th respondents are not privy to the employment contract and should be removed from the Petition and no cause of action exists against them. KEMRI is a body corporate that can be sued in its own name and the petitioner's termination of employment was in accordance with his contract of employment and in this regard there is no case disclosed against the 3rd, 4th and 8th respondents. These respondents hold constitutional offices with definite mandate and duties and without any cause of action against them being disclosed there is misjoinder of the Respondent herein and thus bear no liability and the Petition should be dismissed.

The 7th respondent's case

13. The 7th Respondent filed a Replying Affidavit as a party herein and the Assistant Director, Human Resource at KEMRI. The case is that the Petitioner was employed by KEMRI a body corporate with capacity to be sued and the dispute herein relate to the termination of the employment contract between

the Petitioner and his employer, KEMRI. The joinder of the 7th Respondent herein is erroneous and incompetent as well as the other respondents and they are not parties to the employment contract between the employer, KEMRI and the petitioner.

14. The case is also that the 7th Respondent is aware that KEMRI has a code of conduct and Ethics and a Human Resource Policy and Procedures manual which is circulated to all staff and requires high standards of conduct and performance of all staff members. KEMRI received allegations and complaints against the Petitioner which led to the Petitioner being issued with warning letter and led to disciplinary proceedings against him. Such proceedings were in accordance with the procedures set out by KEMRI and the 7th Respondent was in attendance at the committee meetings. The Petitioner was invited to the committee hearings and advised of his right to be accompanied by a person of his choice where he was able to respond to all allegations and complaints against him. The disciplinary committee discussed the issues before it well before forwarding its recommendations to the 1st Respondent and subsequent Petition No. 33 of 2014 was filed and the Petitioner was a party as the Interested Party. This suit was dismissed by the Court on 30th July 2014 and thereafter an appeal was filed to the Court of Appeal wherein the Petitioner is a party.

15. The case is also that the 1st Respondent passed a resolution for the incorporation of a company known as KEMRI Enterprises & Services Limited (KEMRES) which was to be wholly owned by KEMRI so as promote its commercialization of research work. In KEMRES, KEMRI held 51% shares, Dr Solomon Mpoke as chief executive officer held 15% share and the Petitioner held 10% share. The 1st Respondent later made a resolution to change the shareholding and Dr Mpoke agreed to sign for this change but the Petitioner refused despite repeated requests.

16. The case is also that KEMRI constituted a disciplinary committee chaired by Dr Kihumbu Thairu where the issue of KEMRES was deliberated on 4th April 2014, the Petitioner was present with his representative. The 7th Respondent was present at this meeting for human resource and as a staff member of KEMRI and all issues before the committee was fairly considered. There was no discussion of the personal differences between the Petitioner and any other party of matters subject in Civil Case No. 493 of 2013.

17. The disciplinary committee held another meeting on 28th April 2014 chaired by Dr Kahumbu Thairu and its recommendations were adopted by KEMRI. The allegations that the 7th Respondent had vested interests in the matters under deliberation were found to be malicious and incorrect as she had no interest in the position the Petitioner held at KEMRI or the issues being addressed by the disciplinary committee.

18. The 7th respondent's case is that, as the head of human resource at KEMRI, human resource department is the custodian of performance data and records for all staff and allegations by the Petitioner that on 6th May 2013 a meeting was held in Naivasha to discuss performance appraisals is misleading.

19. In this case the disciplinary committee was very objective in its deliberations and the personal differences and matters in Civil Case pending between the 7th Respondent and the Petitioner were not in issue in the petitioner's disciplinary case. matters outlined by the Petitioner are malicious and in bad faith and the suit is vexatious as the disciplinary committee was properly constituted to inquire into the allegations and complaints against the Petitioner and another employee and had a right to appeal but failed to do so; the reliefs sought are not supported in law; there is no particular claim against the 7th Respondent as she only acted in her capacity as human resource at KEMRI and cannot be held liable as she acted in good faith for her office; and the Petitioner has come to Court in bad faith as he has another matter before the Court of Appeal and in addition the Petitioner has always acted in defiance of the 1st Respondent and chief executive officer. There is no breach of the petitioner's constitutional rights. The Petition should be dismissed.

Submissions

20. The parties opted to file their written submissions herein.

21. The Petitioner submitted that he was NOT subjected to a disciplinary process that was expeditious, reasonable, lawful and procedural as under the provisions of Article 47 and 50 of the constitution. The Petitioner as the Principal research officer and head of department of planning monitoring and evaluation was involved in continuous surveillance, collection and analysis of information necessary for effective stewardship of KEMRI. The Petitioner was dismissed based on false allegations following a disciplinary process to coerce him to change the shareholding in KEMRES Ltd registered as a private company. During the disciplinary hearing the committee considered allegations that are subject of Civil Suit No.493 of 2013 filed by the 6th respondent. At the disciplinary hearing the Petitioner requested for further details but was not provided with the same, he did not disrupt the hearing, and there was no show cause letter issued with regard to his disruption of a board meeting.

22. The Petitioner also submitted that he was never absent from work without permission; he did not abscond duty or fail to attend the performance contracting exercise for 2012/2013; there was no misrepresentation of the respondents before the office of the ombudsperson; and the disciplinary committee comprised the 6th Respondent who had instituted a civil suit against the Petitioner and hence had a vested interest while the 7th Respondent had colluded with the 6th Respondent to write adverse letters against the petitioner. At the hearing, the Petitioner was allowed very little room to Respondent to allegations against him.

23. This disciplinary hearing did not meet the principles of Article 47 and 50 of the constitution.

24. The Petitioner also submitted that he was victimised for performing his public duty contrary to Article 236 of the constitution. Before dismissal, the Petitioner had brought to light abuses of power, unfair treatment and maladministration at KEMRI that had led to him being obstructed from performing his oversight duties as head of monitoring and evaluation; he was frustrated and discriminated; the 6th Respondent was opposed to the activities of the department of planning monitoring and evaluation where the Petitioner was head; he was not invited to a retreat held in May 2013 by the 6th Respondent on organisational chart where performance appraisal was discussed; and when the Petitioner briefed members of KEMRI board, he was ignored.

25. The Petitioner also submitted that while performing his duties in planning and monitoring he learnt of a project RCTP-FACES which the 6th Respondent is a co-director and has an NGO under the same name with its address being the Centre of Microbiology Research at KEMRI which is a gross violation of government regulations and unethical this being conflict of interest on the part of the 6th respondent. By excluding the Petitioner in KEMRI strategic planning, he was being prevented from monitoring procurements and expenditures in the RCTP-FACES project. This also was as a result of an internal audit report which uncovered questionable expenditure of comingling of funds and assets. Instead of addressing the misappropriation of funds, the Petitioner was issued with warning letter for gross misconduct by the 2nd respondent.

26. That the Petitioner was dismissed for undertaking his public duty and his rights under Article 236 of the Constitution were violated. He was not accorded due process as held in the case of **Richard Bwogo Birir versus Narok County Government & 2 others [2014] eKLR**.

27. The Petitioner also submitted that a public officer cannot be retired on public interest on a non-existent ground. In the case of the disciplinary hearing of the petitioner, the committee concluded that he should be retired from service on public interest without disclosing any such allegations in its proceedings. That the Respondent relied on this ground upon realisation that there was no ground to warrant the summary dismissal. There was a duty to state the public policy objective in making such a decision as held in the case of **D K Njagi Marete versus Teachers Service Commission [2013] eKLR**. There was also no evidence as to the process employed by the respondents to arrive at this public interest reason for the termination of the Petitioner as was held in **Mary Chemweno Kiptui versus Kenya Pipeline Company Limited [2014] eKLR**. And to arrive at such a reason was too harsh in the

circumstances as there was no justification for it.

28. The Petitioner also submitted there was no alternative dispute resolution mechanism at his disposal to exhaust as the 1st Respondent refused to consider his appeal.

29. On the joinder of the parties herein, the Petitioner submitted that the 1st and 2nd respondents are parties herein for their role in KEMRI and were part of the breach of his constitutional rights. The 3rd, 4th and 8th respondents are enjoined herein as the parent ministry and where the Petitioner sought assistance and as such and the 8th Respondent being legal advisor to government this is a Petition and the privity of contract does not arise. The 5th Respondent as an independent constitutional commission is responsible integrity matters a subject of this petition. The 6th Respondent acted irregularly in breach of duty and her actions led to the unfair administrative process under Article 47 and the victimisation of the Petitioner contrary to Article 236 of the constitution. The 7th Respondent is a party being the direct participant in the intimidation and eventual unfair dismissal of the petitioner, she ignored the human resource practices by writing letters and taking action without due process, at the disciplinary hearing there was no fairness accorded to the petitioner.

30. The Petitioner is seeking for orders that he was taken through a flawed disciplinary process; was unfairly retired on public interest; international dispute mechanisms had been exhausted and was victimised for doing his public duty.

31. The Petitioner has also relied on the following cases – **James mwaniki Thati S/ACP versus inspector General & 4 others [2014] eklr**; and **Abraham Gumba versus Kenya Medical Supplies Authority [2014] eklr**.

The 1st, 2nd, 6th and 7th respondents' submissions

32. The respondents submitted that the Petitioner was employed by KEMRI who is not a party herein. KEMRI has its Staff Regulations issued to all staff and has a provision of a Disciplinary Committee to investigate allegations and complaints against any staff. In this case the Petitioner was heard by the disciplinary committee which made recommendations to the 1st Respondent which retired the Petitioner on public interest on 17th November 2014. There has been a previous suit Petition No.33 of 2014 on this matter and the Petitioner was a party. From this petition, there is an appeal pending before the Court of Appeal.

33. The respondents submitted that the Petitioner as an employee of KEMRI he should have sued thus instead of its employees or the board under the provisions of section 19 of the Science, Technology and Innovations Act that establish KEMRI. There is no cause of action against the respondents as they were not his employers as defined under the section 2 of the Industrial Court Act [Employment and Labour Relations Court Act]. Any claims against the 6th and 7th respondents are made in their capacity as staff of KEMRI and cannot be held liable in their personal capacity. This is a case on non-joinder of the employer and the misjoinder of the 6th and 7th respondents. There is no case against the respondents.

34. The respondents also submitted that the Petition is incompetent as there is a previous suit Petition No.33 of 2014 that was filed and the Petitioner was an active participant and which suit was dismissed. There is an appeal before the Court of Appeal. The reliefs sought in this Petition are similar to what the Petitioner asked in the previous petition. For the court5 herein to make a decision while there is a pending appeal over the previous suit would lead to conflicting decisions over the same matter.

35. The respondents also submitted that the Petitioner was dismissed fairly as under the provisions of section 43(1) of the Employment Act. The employer in this case had valid reasons for termination and there was proof. The resulting termination by retirement on public interest is a form of termination of employment as held in **D.K. Njagi Marete Case** as cited above. The employer has the duty to prove that the termination was fair and in this case KEMRI bears such responsibility and has not been enjoined

herein so as to contest the case by the petitioner. In this case KEMRI applied its regulations to hear allegations and complaints against the Petitioner and the 1st Respondent constituted a committee to hear the case, the Petitioner was accorded his rights as under section 41 of the Employment Act, he was accompanied by Dr Juma and actively participated in the proceedings. The committee recommendations were then adopted by the Board and KEMRI terminated the petitioner. The reasons then leading to the petitioner's termination met the threshold set out under section 44(4) of the Employment Act.

36. The claim for compensation was not pleaded and the Petitioner cannot be awarded what was not claimed in his petition. Other remedies are general not capable of being awarded. Orders of mandamus and certiorari are not available to the Petitioner as there is no public right revolving around his employment. The claim for an injunction against the respondents to stop the disciplinary action is discretionary and he has not come to Court in clean hands. The rights stated to have been infringed have not been demonstrated to warrant the constitutional remedies sought and should be dismissed.

37. The respondents have relied on the following cases - **Mwatata Juma Mwangala versus Ms Anne Waiguru & others, ELRC Petition 37 of 2013; Ronald Kimatu Ngati versus Ukulima Sacco Society Ltd, Civil Appeal No.277 of 2009; Joseph Mbuta Nziu versus Kenya Orient Insurance Company Ltd, Civil Suit No.156 of 2006 (Mombasa); Prisca Kemboi & Others versus Kenya Post Office Savings Bank, Petition No.38 of 2013.**

3rd, 4th and 8th respondents

38. The respondents submitted that this is a case between an employer and employee but the employer, KEMRI is not a party to this suit. Section 16 of the Science, Technology and Innovation Act has been ignored. Termination of the petitioner's employment was lawful under his contract of employment and thus the respondents bear no duty herein. There is no privity of contract between the respondents and Petitioner so as to confer rights or impose obligations. The parties sued herein are not sued in their capacity as the employer as the 1st and 2nd respondents are just offices or officers undertaking their roles but not as employers. The orders sought cannot be issued against the respondents.

39. The respondents also submit that the Petitioner does not disclose any constitutional violations against him to warrant the remedies sought. The myriad of constitutional provisions cited are not supported by any evidence and even where such provisions are noted, none relate to the functions of the respondents. There is no breach of such rights that have been alleged as committed by the respondents.

40. The Petitioner is not entitled to the reliefs sought against the respondents. The employment contract alleged to have been violated was between the Petitioner and KEMRI which is not a party herein so as for the Petitioner to seek the remedies outlined. To seek remedies based on constitutional violations, such a party must set out with a reasonable degree of precision the complaints, the provisions said to have been violated and thus commensurate with the remedy sought. The orders sought by the Petitioner are against public interest and should not be granted and Petition dismissed.

41. The respondents have relied on the following cases – **Aineah Liluyani Njirah versus Agha Khan Health Services [2013] eKLR; Dunlop Tyre Co versus Selfridge [1915] AC 846; Tweddle versus Atkinson [1861] 1 B&S 393; and Anarita Karimi Njeru versus Republic [1976-1980] KLR.**

The 9th respondent

42. The Respondent submitted that although the Petitioner has made submissions with regard to his early retirement from employment by KEMRI, he has not pleaded or particularised the manner in which the Respondent has violated any of the cited provisions of the Constitution or law. There is no pleading on any wrongdoing, default, malfeasance or misfeasance on the part of the Respondent has been cited.

43. The Respondent received a complaint from the Petitioner and made an enquiry with regard to matters set out by the Petitioner but became aware that there was Petition No.33 of 2014 where the

Petitioner was the first interested party and thus terminated further action in the matter as required by law. Section 30 (c) of the Commission of Administrative Justice Act preclude the Respondent from investigation any matter which is pending in court. The Petitioner was notified of the discontinuation of the inquiry in writing, he protested this decision but has not challenged these facts.

45. The Respondent also submitted that in the entire petition, there are no adverse facts against the Respondent alleging any wrongdoing so as to seek the remedies outlined against them. Under the law, the Respondent acted as required and where the matter remained pending in court, no further action was required by them. The Respondent is therefore wrongly joined in these proceedings; there is no demonstration of any reasonable cause of action or that the Respondent is a necessary party herein.

46. The Respondent also submitted that the remedies sought against them that they did not act independently is incorrect as there was no default since the Petitioner with the knowledge of Petition No.33 of 2014 participated as an interested party. With that knowledge, the Respondent had to stop any further inquiry into his complaints. The alleged violation by the Respondent of the provisions of Article 73 of the Constitution have not been set out; such allegations are general and not capable of proof any action or omission to warrant the remedies sought. The Respondent was always impartial in its inquiry into the matter until the matter was seized by the court. The case against the Respondent should be dismissed and costs to follow the cause.

Determination

Several issues arise from the Petition that require determination. I have outlined them as follows;

Whether Petition 33 of 2014 and Appeal 24 of 2015 before the Court of Appeal relate to the same issues as herein;

Whether the pending appeal in Civil Appeal No.24 of 2015 will lead to the Court rendering conflicting decisions;

Whether the non-joinder of KEMRI is fatal to the suit;

Whether there is misjoinder and non-joinder of parties;

Whether the disciplinary proceedings against the Petitioner met the required threshold; and

Whether the remedies sought are due.

47. The first challenge to the Petition was that there exists Petition No. 33 of 2014 that substantively addressed matter similar to the Petition herein. That the Petitioner was an active party in Petition No.33 of 2014, there is an Appeal to the Court of Appeal and to move the Court as herein would be to invite the Court to give conflicting decisions. I have taken time to read Petition No.33 of 2014, the Grounds of Appeal in civil Appeal No.24 of 2015 and make the following emerge;

- a. That Petition no.33 of 2014 is filed by Okiya Omtata Okoiti and Nyakina Wycliffe Gisebe as the Petitioner against KEMRI Board of Management & 2 Others and Kizito Lubano & 4 Others as Interested Parties. The Petitioner herein, Kizito Lubano is sued as an Interested Party.
- b. That the current Petition is by Kizito Lubano against KEMRI Board of Management & 7 Others.
- c. That Civil Appeal No.24 of 2015 is filed by Okiya Omtata Okoiti and Nyakina Wycliffe Gisebe as the Petitioner against KEMRI Board of Management & 2 Others and Kizito Lubano & 4 Others as Interested Parties.
- d. That In Petition No.33 of 2014, the 1st interested party being the current Petitioner herein is described as follows;

The 1st interested party – Kizito Lubano – is a Principal Research Officer and a former Head of Planning, Monitoring and Evaluation Department at KEMRI. The 1st and 2nd respondents [KEMRI

Board of Management and Director, KEMRI] have threatened to retire him in the public interest as disciplinary action contrary to Article 236 of the constitution. ...

e. That In the current petition, the Petitioner at paragraph 26 of the Petition states;

The Petitioner has been dismissed from service based on false allegations and a faulty administrative process

f. That The two suits thus outlined, one is filed by parties other than the current Petitioner while the Petition herein is solely by Kizito Lubano; one is based on threatened retirement of Kizito Lubano by KEMRI Board of management and others while the Petition herein is based on the dismissal of the Petitioner by KEMRI Board of Management and others; the declaratory orders sought in Petition No. 33 of 2015 and the prayers sought herein are fundamentally different noting the nature of parties who have sued in each case.

g. That Civil Appeal no. 24 of 2014 is specifically drawn from the Ruling of the Court in Petition No.33 of 2014. Such an Appeal has nothing to do with the current petition.

48. It cannot therefore be correct that both petitions in No.33 of 2014 and No.46 of 2015 are similar. The parties and prayers sought in both Petitioner are different. Even where Petition No.33 of 2014 were to be allowed, which is not the case here, the nature of prayers sought against the respondents are different as herein as the Petitioner in this case is seeking for orders on the basis that he has been dismissed from his employment. In my reading of Petition No.33 of 2014, the petitioners were suing in the interests of the public thus;

The 1st and 2nd petitioners who are residents of Nairobi City County, are law abiding citizens of Kenya, public spirited individuals, human rights defenders, and strong believers in the rule of law and constitutionalism. They are members of Kenyans for Justice and Development Trust, which is a legal trust, incorporated in Kenya and founded on republican principles as set up with the purpose of promoting democratic governance, economic development and prosperity. ...

49. I therefore find the current Petition is not a replica of Petition No.33 of 2014. There are fundamental differences to both suits. The prayers/orders sought are separate and distinct from each other and the Petitioner is properly before this court.

50. The other question is whether there is the non-joinder of KEMRI as a crucial party herein. That KEMRI was the employer of the Petitioner but has not been joined herein as a party and thus fatal to the suit. All the Respondent strongly made submissions in this regard noting the constitutive Act for KEMRI, the Science and Technology Act, that KEMRI being a body corporate with perpetual succession has power to sue and be sued in its name. In this regard the Employment and Labour Relations Court (Procedure) Rules (the Rules) define who a *Party* to any proceedings is;

“Party” means a person, a trade union, an employer, employer’s organization or any corporate body directly involved or affected by an appeal, or claim to which the Court has taken cognizance or who is a party to a collective agreement referred to Court for registration.

51. I am keen on the part that such a *party* includes that person or entity *directly involved or affected by an appeal, or a claim to which the Court has taken cognizance*. Such a *party* therefore has to be assessed as one to be included in proceedings before this Court to ensure the ends of justice are achieved. The nature of proceedings before this Court are that in labour relations, the Court should not overly rely on technicalities at the expense of substantive justice. Where the Petitioner has sought for orders against the parties before court, such prayers shall be analysed on their merit and where a party that is crucial to the claim but has not been joined herein, no orders can be made against such an entity as they are not a party to the suit in the first instance. However, where the Court finds it necessary and just to direct the enforcement of orders of the Court and that such an enforcement would only be possible where a particular party named or not named as a Respondent is necessary, nothing stops the course of justice to so direct.

52. The above finding is not a departure from the position long held in the Case of **Werrot and Company Ltd & others versus Andrew Douglas Gregory & Others, HCCC No. 2363 of 1998, LLR 2828;**

For determining the question of who is a necessary party there are two tests; (i) there must be a right to some relief against such a party in respect of the matter involved in the proceeding in question and (ii) it should not be possible to pass an effective decree in the absence of such a party.

53. The question should then be whether the current respondents are properly joined herein and if so whether such presence is necessary in order to enable the Court effectually and completely adjudicate upon and settle all the questions involved in the suit. There must be a demonstration by the Petitioner that there is a direct and real interest in the reliefs sought against the listed respondents and thus necessary parties herein. See **Benjamin Kipketer Tai versus Kenya Commercial Bank, HCCC No.87 of 2003 (Kisumu) [2003] LLR 8071.** In this regard therefore I wish to refer to **Amon –vs- Raphael Tuck and Sons Ltd [1956] 1 ALL E.R. AT Page 273** it was held *inter alia* that;

... A party may be joined in a suit, not because there is a cause of action against it, but because that party's presence is necessary in order to enable the Court effectually and competently adjudicate upon and settle all the questions involved in the cause or matter.

54. In this case therefore, and noting the decision in **Benjamin Kipketer Tai Case** and in **Amon case**, the non-joinder of KEMRI is not fatal to the suit. The Petitioner has set out the orders sought against each Respondent and granted the history of the matter, he has laid a background relating to each Respondent with regard to the Petition herein. The 1st Respondent manages KEMRI which is a state corporation and issued the letter of dismissal; the 2nd Respondent is the chief officer of KEMRI and acted for and on behalf of such body; 3rd Respondent is the parent ministry with regard to KEMRI while the 4th Respondent is the chief officer in charge of the 3rd respondent; the 5th Respondent is a constitutional commission with the mandate of ensuring compliance with chapter six of the Constitution with regard to leadership and integrity; the 6th Respondent supervised the petitioner; the 7th Respondent is head of KEMRI human resource function while the 8th Respondent is the legal advisor of the national government; and the 9th Respondent as an independent commission on administration of justice addressed this matter before it was filed in court. Each party herein is clearly assigned a role with regard to the background of the Petition even where there may be no specific payer against such a party. Where KEMRI is not joined and the Court establishes that there is a good case against such a body, there is discretion to order as appropriate. See **Marekere University versus St. Mark Education Institute Ltd & Others, Kampala High Court Civil Suit No.378 of 1993 [1994] KALR 26.**

The fact that the plaintiff chose to file a suit against the two defendants only, implicitly meant that it did not sue anyone else ... it is clear that it has not indicated that it wishes to sue any other party.

55. I hasten to add, where a suit is suitable before court, non-joinder of a party cannot remove responsibility from other parties sued as respondents. An omission of any party as Respondent cannot be a justification by other parties that the suit should not move simply because such other party is not joined. See **Busienei versus Transnational Bank (K) Ltd [2002] 1 KLR 784.** 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. That is my reading of the provisions of Article 41 and 159 of the Constitution read together with section 20(1) of the Employment and Labour Relations Court Act. To allow the respondents escape responsibility where such exists, would be tantamount to rendering fair labour practice and fair industrial relations ineffective.

56. I therefore find the joinder of the respondents herein is necessary as this will enable the Court to effectually and completely adjudicate upon and settle all questions involved in the petition. Where there is an omission to join KEMRI as a right party, such non-joinder does not remove responsibility from the other respondents. Such non-joinder does not render the Petition fatal.

57. On the substantive issues raised in the petition, the Petitioner submitted that his rights under the Constitution were violated. I single out the violations set out under articles 41, 47, 73, 75, 232 and 259 which relates to fair labour practices, fair administrative action, the exercise by state officer of their authority in fairness and with integrity, state officers to avoid conflict of interest in the performance of their duties, accountability for administrative acts, and the requirement on all to promote the values and principles in the constitution. The Petition is based on the facts that the Petitioner was employed by KEMRI as the Principal Research and Head of the Department of Planning, Monitoring and Evaluation until his dismissal on 17th December 2014 on the grounds of retirement on public interest. The Petitioner has challenged the reasons for his dismissal from employment; the process and reasons of and for his disciplinary hearing; the persons presiding over the disciplinary hearing; and that his appeal against his retirement on public interest was never considered.

58. In the ordinary exercise of its powers, the Court appreciates that parties in an employment relationship should be left to address disciplinary matters by the use of internal mechanisms. Such internal procedures must be guided by the operative law and Constitution but of fundamental importance is to ensure that an employee is heard at the shop floor as the best forum where basic facts in employment are to be found. The Court acknowledges that interference in such matters will remove the necessary parties from establishing and utilising available policy and regulation mechanisms established for that purpose. The Court will however intervene in exceptional cases where it is apparent that the proceedings so taken to address any disciplinary case is based on an illegality or the continued administrative action is an injustice *ab initio* and the continuation of such action will result in an inherent injustice. These were matters that the Court addressed at length in **Petition No.33 of 2014** as cited above. Similar findings were made in the case of **Joseph Mutuura Mberia & Another versus The Council Jomo Kenyatta university of Agriculture and Technology (JKUAT) Cause No.1587 of 2013**;

... an employer is at liberty to commence disciplinary proceedings against the employee and it is the duty of the employee to justify in the administrative disciplinary process the continuation of his employment. However where the Court establishes that such administrative disciplinary proceedings are commenced with ulterior motive or as a process shrouded with illegalities, then the Court must intervene and stop such an illegality.

59. In this case, the Petitioner has challenged the process undertaken in his disciplinary hearing, the reasons for such action and the resultant outcome of such a process. the respondents have justified such action noting that the process undertaken in the hearing of the petitioner's gross indiscipline was in accordance with the policy regulations adopted by the 1st Respondent for KEMRI for its employees and that there existed valid reasons for the disciplinary action against the Petitioner and the decision to retire him on public interest was approved by the 1st Respondent for KEMRI. In this regard, where such a process, reasons and resultant outcome is thus challenged, the Court must go into the same and ensure there was due process, there was no illegality and the administrative action taken against the Petitioner was fair or unfair in the circumstances. Such an assessment by the Court does not go contrary to the Respondent disciplinary procedures as the issue in question is the legality, the fairness and compliance to due process.

60. In a similar scenario in the case of **Nomgcobo Jiba v Minister of Justice & Constitutional Development & 16 Others, Case No J167/09 Labour Court Johannesburg** held;

[On the question as to whether] the Labour Court has jurisdiction to interdict any unfair conduct including disciplinary action. However such an intervention should be exercised in exceptional cases. It is not appropriate to set out the test. It should be left to the discretion of the Labour Court to exercise such powers having regard to the facts of each case. Among the factors to be considered would in my view be whether failure to intervene would lead to grave injustice or

whether justice might be attained by other means. The list is not exhaustive.

61. However, the statutory mandate of the 9th Respondent is clear. Such mandate was put into motion by the Petitioner before filing this petition. The 9th Respondent is bound to perform its mandate within its constitutive statute which I find was properly undertaken with regard to matters outlined in this petition. To enjoin the 9th Respondent in these proceeding was unnecessary.

.62. Starting from the end, on **17th December 2014** the Petitioner was issued with a dismissal letter dated 17th November 2014. The letter stated that the Petitioner was dismissed for three (3) reasons/grounds out of the listed 6 issues before the disciplinary committee against him. The 1st Respondent noted;

The Board noted that allegations 2, 3, and 6 are currently a subject under consideration by the Court and were not therefore discussed. After listening to your responses, the board has found your responses in respect to allegations 1, 4 and 5 above to be unsatisfactory, and consequently holds you guilty of the offences.

63. Of the six (6) allegations made against the Petitioner, three (3) were not in issue at the hearing as noted in the letter of dismissal. Such were matters subject of determination. What was considered were allegations 1, 4 and 5 that;

1. *Allegations that you disobeyed lawful instructions to you from the board of management, vide the board's letter dated 29th June 2011, and director, KEMRI, vide his letter dated 30th November, 2011 by refusing to facilitate amendment of KEMRES Memorandum and Articles of Association as resolved by the Institute's board in breach of the KEMRI Staff Service Regulations*
4. *Allegations that you were absent from duty without permission from 16th January – 23rd January 2014, and failed to provide satisfactory explanation on the same in contravention of the KEMRI staff Service Regulations.*
5. *allegations that you abandoned without formal approval, the Institute's PC evaluation exercise for the year 2012/2013 conducted in October 2013 at Utalii College, an exercise which is a culmination of PC activities coordinated throughout the year by the M&E department, and where you, as the Head of the Department, was therefore expected to provide guidance and leadership throughout the process.*

64. These were thus the allegations against the Petitioner to which he was supposed to give a satisfactory response. These were allegations the Petitioner was summoned to address vide letter dated 19th March 2014. On 28th March 2014 the Petitioner gave his detailed responses to all the issues against him but the Court concern is with regard to the 3 issues above, 1, 4, and 5.

65. On issue one and **allegation Number (1)** the Petitioner noted that KEMRES is a limited entity governed by the Companies Act and the procedure for the amendment of the Memorandum and Article of Association is prescribed in law. In the Replying Affidavit of the 7th Respondent filed on 1st July 2015 at paragraph 15 she avers that

I am aware that the Institute's board of Management passed a resolution for the incorporation of a company to be known as KEMRI Enterprises & Services Limited (KEMRES) which was to be wholly owned by the Institute, and whose objective was to promote the commercialisation of research work.

66. This registration of KEMRES is confirmed by annexure at page 532 of the petitioner's bundle. A certificate of incorporations thus;

No. CPR/2011/43112

CERTIFICATE OF INCORPORATION

I hereby certify that –

KEMRI ENTERPRISES & SERVICES LIMITED

Is this day incorporated under the Companies Act (Cap.486) and that the Company is LIMITED.

GIVEN under my hand at Nairobi this 14th day of March Two Thousand and Eleven [2011].

[Signed]

Registrar of Companies.

67. A registered company under the Companies Act, is regulated under the same Act. Any changes to the Company must conform to its constitutive Act. In this regard the 7th Respondent in her affidavit filed on 1st July 2015 at paragraph 17 affirms;

I am aware that the institute's board of Management subsequently made a resolution for the institute's interest to change the shareholding in the said Company {KEMRES} and upon communication to the said resolution the institute's Chief Executive Officer, Dr Solomon Mpoke, agreed to sign the documents for transfer of shares but the Petitioner herein refused to comply with the Board's request despite repeated requests and reminders as borne out in the annexed copies marked "AW-3".

68. Annexure "AW-3" is a letter by the chairman of the 1st Respondent dated 29th June 2011 directed at Dr Solomon Mpoke and the Petitioner on the amendment to KEMRES Memorandum and Articles of Association. This letter is issued after the registration of the KEMRES Company on 14th March 2011. Upon such registration, the affairs of such Company could only be regulated under the Companies Act and by its Directors. Where KEMRI had shareholding therein in the Company and wished to make changes to such shareholding, as such a party to the company they had the freedom to make such changes but such changes were not to affect the shareholding of the other directors. Upon registration of the KEMRES Company, the directors therein had the freedom to act in accordance with the Company Memorandum and Articles of Association. In this case, the Petitioner effectively became a director of KEMRES with the sanction of his employer but to KEMRI he remained bound by his terms and condition of employment as the Principal Research Officer and head of Department of Planning, Monitoring and Evaluation. To thus require him to make changes under KEMRES using the KEMRI disciplinary mechanisms over a limited Company is a procedure that is clothed with illegality, coercive and contrary to fair labour practices under the provisions of Article 41 of the constitution. For the 1st, 2nd, 6th and 7th respondents to move the process of the disciplinary process on a matter such as this set out under allegation 1 in the summon issued to the Petitioner is an unfair administrative action contrary to the provisions of Article 47 of the constitution.

69. I therefore find no good basis upon which the 1st respondent, relying on a matter set out under allegation 1 reached their finding that resulted in the dismissal of the petitioner. Such a reason lacks justification as it was not a valid issue against the Petitioner in the course of his employment contract.

70. With regard to **allegation four (4)**, the Petitioner explained his absence from duty on 16th to 23rd January 2014 in that;

On 8th and 16th January 2014 he was at an interview at NACC;

On 17th January 2015 he was Aga Khan and Nairobi Hospital attending to a painful back; and

17th to 24th he was on a doctor's bed rest.

71. During the disciplinary hearing meeting held on 4th April 2014, during deliberations on allegation number 4 it was noted as follows;

That Dr Kizito alleged to have been present in the Institute on the 20th and 21st January 2014 despite having been allowed off-duty by a medical practitioner for the period of 17th to 24th January 2014.

...

That management should produce evidence (delivery book) showing attempts to reach Dr Kizito.

Agreed:

That Dr Kizito was guilty on this count since he did not inform his supervisor of his sickness neither did he submit his medical certificate to the Staff Clinic as was required of him ...

72. Page 10 of 15 to these minutes is not attached. I have gone through the entire record of the Petition and replies thereto, this page is missing. That notwithstanding, though the Petitioner was found guilty of this offence, his salary for the days said he was absent was not paid. He notes this much in his reply filed in response to the allegations against him. He also records that the non-payment of such salary in this regard was causing his family great hardship. I take it then, for the days the Petitioner was absent from duty, even before he was heard and though the record in this regard is incomplete, he was punished for it as his salary was stopped. The 1st, 2nd, 6th and 7th respondents do not clarify as to whether such salary has since been paid and even if it was paid, which is not stated, the withholding of such salary for the duration it was, I find to be undue punishment for the allegation made against the Petitioner and before he was heard as to his reasons of such absence. To then use the same reason for a dismissal is double punishment. This is not a fair labour practice and contrary to good practice in an open and democratic society such as ours and as a requirement under Article 41 and Article 20(4)(a);

(a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom;

73. To use the same reason of the petitioner's absence from duty to retire him on public interest noting that he had already been penalised is to deny him fairness and contrary to human dignity, equality of terms and contrary to fair labour practice. It goes contrary to the tenets of due process. It is contrary to what is fair, just and reasonable. In any event, under the KEMRI Staff Service Regulations at clause 14.11 it states;

Absence from duty without leave

Where an employee is absent from duty without leave or reasonable cause for a period exceeding forty-either hours and the employee cannot be traced within a period of twenty-one working days from the commencement of such absence, or if traced no reply to a charge of absence without leave is received from him within twenty-one working days after the dispatch of the charge to him, the Director/CEO may summarily dismiss him on grounds of desertion.

74. Where the above provisions were to be strictly followed, the Petitioner is said to have been absent from 16th to 23rd January 2014. Therein are six (6) working days. On 23rd January 2014 a notice of absence was issued to the Petitioner by the 7th Respondent and he was required or Respondent within 7

days. The Petitioner replied on 11th February 2014 but on 25th February 2014 the 7th Respondent replied noting that the explanations given were not satisfactory and directed him to submit the original medical receipts with regard to the medical expenses at the Aga Khan and Nairobi hospitals.

75. I therefore find, as noted above, the petitioner's salary was already stopped. In submissions, the respondents do not make any reference to this fact as to whether such salary was paid or the sanction lifted, what is clear is that these allegations formed part of the 6 issues that formed the basis of the disciplinary hearing leading to the dismissal of the Petitioner by retirement on public interest. I find such a sanction in the circumstances of the case to be excessive as this was double punishment. To use one complaint against an employee for double punishment is too harsh a practice that has no justification in fair labour relations.

76. With regard to allegation **Number five (5)**, the Petitioner is said to have abandoned the PC evaluation exercise taking place at Utalii College and an exercise that fell under his department. To these allegations the Petitioner submitted that he was at the meeting in Utalii College but it took longer than expected and he had to urgently travel to Mombasa to attend to his child's school, he alerted the Director before his exit from the meeting, he also informed his colleague and the evaluators present for the exercise and the Director did grant such permission.

77. In the disciplinary committee hearing, these minutes are missing page 10 of 15. Allegation 5 starts from such page. The Court record has page 11 of 15 which must be a continuation of the previous missing page. In the minutes it is noted that;

Agreed:

That Dr Kizito was found guilty on this count as charged since he did not receive explicit permission neither from his immediate supervisor nor from the Director, KEMRI to excuse himself from this important institute and National exercise.

78. The allegation against the Petitioner here was that he *abandoned without formal approval the PC evaluation exercise for the year 2012/2013*. The Petitioner has submitted that indeed he was at this meeting but had to leave early to attend to an urgent meeting in Mombasa with regard to his child at school and that before he left the meeting, he informed the KEMRI Director. The contest here is that the KEMRI Director did not give *explicit permission*. What then is *explicit permission*?

79. The **Concise Oxford English Dictionary** defines the word *explicit* as follows:

Stated clearly and precisely.

80. *Permission* on the other hand is defined as;

A licence or liberty to do something; authorisation. Authorisation that is clearly and unmistakably granted by action or words, oral or written.

81. This is the nature of permission that the Petitioner is challenged to have failed to have at the time he exited the meeting held on October 2013. In response, the Petitioner states that before he left the meeting he informed his immediate supervisor and the CEO as well as the person facilitating the meeting. The CEO being the officer responsible for daily running of KEMRI was thus informed and did let the Petitioner leave. Save for what is stated in the 5th charge against the petitioner, I find no other complaint against him by his immediate supervisor, the CEO or any other officer of the Respondent to suggest, imply or require that the Petitioner should have had *explicit permission* granted to him before exiting the meeting.

82. Under the Science, Technology and Innovation Act, section 30 provides for the role of the Director of KEMRI with the functions of;

(2) The Director of the Agency shall be the chief executive officer of the Agency and responsible to the Board of the Agency for the day –to-day running of the affairs of the Agency.

83. Under such provisions therefore, where the Director as the CEO ought to have issued such *explicit permission* such requirements should have been made before the director allowed the Petitioner to exit the meeting. Where such exit was obtained irregularly, the KEMRI human resource policy was adequate to address this before the matter could arise on 4th April 2014 requiring the Petitioner to respond together with other myriad of allegations. Where it was necessary for the Petitioner to respond immediately about his sudden exit from the meeting in October 2013, a notice to that effect should have been issued immediately.

84. The question then with regard to the nature of *permission* granted to the Petitioner becomes quite subjective. It is the word of the disciplinary committee members against the Petitioner and in the absence of the person who gave him such *permission* to be away from the meeting, it cannot be an issue of the Petitioner *abandoning without formal approval*. Permission was granted by none other than the Director and Chief Officer of KEMRI for the Petitioner to leave the meeting early. Where the Petitioner acted inappropriately, this was against the Director as against any other officer present at the meeting. Where the director thus felt slighted for not being made aware of the early exit of the petitioner, then the director became a key witness of what exactly transpired between him and the petitioner. Such matter should have been procedurally addressed before the show cause and disciplinary hearing on 4th April 2014 as it concerned a meeting held in October 2013. To raise it in April 2014 without first taking the matter through the processes necessary is to render the Petitioner response ineffective under the circumstances of all the allegations he was faced with and required to prepare adequately. The complainant here should have been the KEMRI Director who is said to have given permission that is said was not *explicit*. Is there such a complaint? See **Jenny Luesby versus Standard Group Limited, Cause No.137 of 2014** at paragraph 62;

... The claimant in this case is accused of insubordination of the CEO and that there was a complaint by KUJ about her conduct. What then can the claimant be said to have done that was contrary to the law? Was this a case for summary dismissal as under section 44 of the Employment Act?

... The respondent's evidence is that the claimant breached the terms of her contract... that her conduct of walking into the editors meeting was insubordination of the CEO and the evidence that while at the editors meeting the claimant was disruptive and where she walked out of the meeting, that this was an act of insubordination. This conduct undermined the authority of the CEO hence the summary dismissal. ... the CEO was however never called to give evidence on the alleged facts of insubordination. Such act were said to be against him and not to any other officer.

85. In this case therefore, where there is a contest such as this one, over a matter serious as to cause the dismissal of the Petitioner by retirement on public interest, great caution and consideration should have been given to each and every allegations made against him. It is obvious from the proceedings herein, the submissions by the Petitioner and matter deponed by the 7th Respondent in the Replying Affidavit filed on 1st August 2015 that the respondents went at great length to have the Petitioner make changes to the KEMRES affairs. Such efforts led to what the 7th Respondent states at paragraph 18 and Annexure "AW-4" the minutes of 4th April 2014 that;

Because of lack of cooperation from Dr Kizito, the institute is now pursuing registration of another company to replace KEMRES. That Dr Kizito disobeyed lawful instructions from the Board and from the Director, KEMRI.

86. Such averments are indicative of frustrations from the 1st, 2nd and 7th respondents against the petitioner. He had become a stumbling block to the required changes to the directorship of KEMRES. This was a Company with the purpose of *commercialisation of research* and as such, the proposed changes by the KEMRI Board that were intended to remove the Petitioner only and retain the two other

directors, Dr Solomon and Boit and add others was being 'frustrated' by the petitioner. There was therefore sufficient motive to have him removed from his employment to pave way for staff who would comply to directions as required. This is not the purpose of public service. KEMRI and the 1st Respondent Board carry a public function. Equally, the 2nd and 7th respondents are not ordinary persons when undertaking their roles within the public entity, KEMRI. They act for the public good as public officers. Their service is to the public and not for themselves. To therefore frustrate the employment of another public officer undertaking his duties simply because he had refused the coercion of relinquishing his interests in a limited Company is to act contrary to the provisions of Article 10, 20,41, 47, 73,75, 232, 236, and 259 of the constitution. These are fundamental rights and where violated the Petitioner has a remedy from this court.

87. Based on the above analysis, I find merit in the challenges made by the Petitioner against his dismissal and retirement on public interest. Had such matters been considered in an appeal using the internal mechanism, such loopholes as noted above should have been adequately addressed.

88. Where internal procedure allow for an appeal, this should be exhausted. Where an employee files such an appeal, due process demands that such an appeal be heard on its merit. Where there is evidence that an appeal is allowed by the policy and internal procedures of an employer and such an appeal is not heard on its merit, good reason then exists for the Court to intervene and hear a claimant as had such an appeal been heard and its merit considered, there may have had a different decision. In the case of **Fredrick Owegi versus CFC Life Assurance, Cause No.1001 of 2012** the Court held;

...where there is procedural unfairness the substantive issue faced by the employee is muzzled in the process. Where there was an opportunity to address the core concerns that an employee may have, once due process is not applied the possible outcome is already eschewed against such an employee. The emphasis here is on process, and not result. That being the case, it serves no purpose for the Court to consider and analyse every issue raised by the Respondent in the show cause letter issued to the claimant as the failure by the Respondent to consider all or some of the issues albeit material as rendering the claimant's responses unsatisfactory should have been given further thoughts through a hearing where the claimant should have been heard in the presence of a fellow employee of his own choice. Once that was done the internal procedures of the Respondent allowed for time for appeal, which should have been notified to the claimant at the time of termination. [Emphasis added].

89. However where it is apparent that such an appeal has already been compromised by the actions of the employer and its officer, the employee need not apply it as this would be an act in futility. In this case, the Petitioner filed his appeal, this is on record and the 1st and 2nd respondents have not shown anything with regard to what they did in addressing such an appeal. Had the appeal been given due consideration, noting the obvious challenge to the subjective nature of matters before the disciplinary committee, a different outcome of the appeal was reasonably possible.

90. I therefore find the disciplinary proceedings against the Petitioner were already eschewed and the resulting decision clothed with illegalities. Whatever outcome arose out of proceedings that were shrouded with such illegalities as set to above, the appeal not having been considered, such result became a nullity. It is of no legal effect. This shall be quashed.

91. There are serious issues with regard to leadership and integrity that the Petitioner has set out. I find he has undertaken his public duty that far and despite the non-appearance of the 5th respondent herein, the 3rd, 4th and 8th respondent have the power and mandate to set in motion a process to address any malpractices within KEMRI and its management. I will only say that much.

92. That set out, it is important to revisit the decision of the 1st Respondent to dismiss the Petitioner by retirement on public interest. What led to such a sanction is crucial to interrogate. The Petitioner held a public office for a public body, KEMRI. The officers working at KEMRI are therefore public officers undertaking their public duty for the public good. Disciplinary proceedings for KEMRI employees are

governed by the human resource policy. Such a policy is to guide KEMRI in addressing disciplinary cases and where there is a finding of misconduct, address the same in accordance with the set policy, written law such as the Employment Act or the Constitution as under Article 41. To go outside what is provided for under the KEMRI policy and act for the public good, great caution must be taken and where taken, reason, justification and reasonable sanction must be gone into. To thus arrive at a dismissal and a retirement in the public interest, the 1st Respondent must show as to how such a sanction was arrived at and its rationale.

93. This Court has set some principles in this regard. As submitted by the Petitioner in the case of **DK Njagi Marete versus the TSC**, the Court held that;

... The Respondent [the employer] had the onus to show objective and demonstrable grounds warranting the retirement of the claimant. When a public employer justified the premature termination of a contract of employment, on the grounds of public interest, such an employer had to show its decision was driven by public policy objective, and that the decision taken was legitimate and justifiable. It was not enough to merely write a letter to the employee and inform him that a decision to retire him on public interest had been made. There had to be shown valid reasons amounting to public interest, to justify termination. [Emphasis added].

94. Such a reason cannot be bare. It must have its basis and or a foundational basis. The reason must find validity in a policy, law or public complaint against the subject employee. In this regard, section 43 of the Employment Act is important to restate here thus;

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

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

95. The clarity of section 43 of the Employment Act in this case is that, whether an employee is in the public or private employment, these provisions are mandatory. The termination of any contract of employment must meet a set threshold. There must be genuine reasons to terminate a contract of employment; such a reason or reasons must be proved; and where there are no reasons or the reasons are found not to be genuine, any resulting termination of an employment contract is unfair. The duty is vested upon an employer to prove the reasons for termination of an employment contract. In the **DK Njagi Marete Case** the Court went further and stated that the employer must show objective and demonstrable grounds warranting termination of an employment contract. In this case, the employer who relied on the reason of a public interest had to go a step further and show that such a reason was driven by public policy objective. Therefore without such ingredients, to pick a reason such as the one given to the Petitioner without setting out the principles outlined above rendered the same void. It had no legitimacy as it lacked justification.

96. In a different case that related to an officer employed in the disciplined forces, the Court set out the procedures applicable to all public officers without the exclusion of the disciplined forces. In the case of **John Benson Githinji versus the Attorney General & Others, cause No.2020 of 2011**, the Court held that;

Retirement in the interest of the public is provided for under Regulation 25[2] and 36 of the Public Service Commission Regulations. It is a form of retirement that is resorted to, where termination cannot be effectuated suitably under other Regulations. It also has its procedural protections. The Authorized Officer must have considered every report in his possession made with regard to the Public Officer. The Authorized Officer must hold the view that it is desirable to retire the Public Officer in the public interest. The Public Officer shall be notified of the intention to retire him in this manner, and availed specified complaints and substance of any report or part

thereof which is detrimental to the Officer. He must be given the opportunity to show cause why he should not be retired in the public interest. His representations and the observations of the Authorized Officer shall after this be forwarded by the Authorized Officer to the Public Service Commission, who determines whether the Public Officer shall be retired in the public interest. [emphasis added].

97. to therefore retire an employee in the public interest would therefore appear to require a higher standard of prove with a different set of requirements than in ordinary procedures for termination of employment. upon an employer taking the decision to terminate an employee through any other process and it emerges that the only reason for such termination is the *public interest*, then the procedures and principles set out in the **DK Njagi Marete case** and in the **John Benson Githinji case** would have to be put into motion so as to justify such a reason. Due process is paramount. Before a termination of an employment contract, whatever the public interest that may exist to suggest that such an officer should be retired and their contract terminated, due process must be given a chance. Such an officer must be given notice and a chance to be heard in his defence. In the proceeding against the Petitioner held on 4th April 2014 or any other day, none relate to any notice of retirement in the public interest. To therefore apply the same in his dismissal was arbitrary, unilateral and or influenced by extraordinary motives not disclosed to the Petitioner or to the court.

98. I therefore find the dismissal and retirement of the Petitioner in the public interest lacked justification, it was arbitrary and influenced by malice and ill-motive. This is contrary to the provisions of Article 47 and 50 of the constitution. There was a violation of the petitioner's constitutional rights in this regard.

Remedies

99. In view of the findings made in the judgement, the Court finds that the Petitioner is entitled to the remedies prayed for save that the prayers for compensation for general and exemplary damages for harassment, financial loss, intimidation, defamation and mental torture sets in motion a different set of assessments for the Court consideration. This shall not be gone into factoring that these are not the only remedies that the Petitioner is seeking. However such will be put into account in the final orders of the court.

100. The Petitioner has also set out various declarations with regard to the violation of his rights. He is seeking for the quashing of the decision taken by the 1st Respondent and orders of mandamus compelling the 1st Respondent to reinstate him to his former position as principal Research officer and Head of Planning, Monitoring and Evaluation department. The Petitioner relied on the case of **Mary Chemweno Kiptui** as set out above where there was a reinstatement. The 1st, 2nd, 6th and 7th Respondent submitted that the Petitioner is not entitled to the remedies sought as they are not pleaded. That retirement in the public interest is a form of termination of employment and in this case the respondents were justified in recommending such termination and the fact that the 1st Respondent for KEMRI adopted the same gave it the necessary legal sanction. The respondents cited the case of **Mwatata Juma Mwangala** extensively but I find the same not relevant herein as it related to a different set of facts and the outcome decision cannot in any way be related herein.

101. On the Court finding that there was fundamental failures in the disciplinary procedures taken against the petitioner, the allegations made had no justification and ended in an illegality the Court has given due considerations to all the submissions herein. Such submissions are put into account herein particular averments by Mary Rigoro in her affidavit filed on 24th June 2015 where she states that upon the retirement of the Petitioner his duties were taken over by officers working within KEMRI. I take it then there is no new recruitment with regard to the position the Petitioner held as at 17th November 2014. There is no substantive appointment in this regard and such duties and tasks performed by the Petitioner still exist though currently held by different officers within the respondent.

102. The Petitioner is specific in the nature of orders sought. He is seeking orders of judicial review for

the quashing of the decision of the 1st Respondent to dismiss him in the public interest. He is seeking for compensation for general damages and a permanent injunction against the Respondent with regard to their undertaking similar disciplinary proceedings. Such remedies will be put into account in the final orders of the court.

103. I have taken due assessment of all the issues herein and the factors necessary for application with regard to the provisions of section 49 of the Employment Act with regard to the order for reinstatement. The nature and seriousness of the employment violations herein are serious and only an order for reinstatement can sufficiently address the same. The nature of the illegalities committed shall well be redressed with an order for specific performance. The Petitioner moved the Court immediately and it has been less than one (1) year since his dismissal.

In conclusion therefore, I enter judgement for the Petitioner against the Respondent for:

- a. **The decision to dismiss and retire the Petitioner in the public interest is hereby quashed; *It is declared the Petitioner's dismissal and retirement in the public interest was arbitrarily, unfair and unlawfully applied to him;***
- b. **A declaration that under Article 236 of the constitution, the Petitioner remains the lawful holder of the position of Principal Research Officer and Head of Planning, Monitoring and Evaluation of KEMRI and shall continue to hold such officer with full benefits until otherwise terminated for another other lawful reason or reasons other than the reasons subject of this petition;**
- c. **The Petitioner is hereby reinstated to his position with KEMRI with all his back salary, allowances, benefits and any other legal dues he was entitled to by virtue of his employment with KEMRI;**
- d. **The Petitioner shall report on duty on 2nd November 2015 at 0830 hours and the respondents to jointly and severally permit the Petitioner to resume his official duties with effect as herein;**
- e. **The 1st Respondent is hereby restrained from undertaking disciplinary action against the Petitioner with regard to matters relating and subject of proceedings held on 4th April 2014;**
- f. **The joinder of the 9th Respondent was not necessary in this petition. The 9th Respondent perform a public duty. No costs are due.**
- g. **The 1st Respondent shall meet the costs of the Petitioner while the 2nd, 3rd, 4th, 5th, 6th, 7th and 8th respondents shall meet their own costs.**

It is so ordered.

Delivered in open court at Nairobi and dated this 30th day of October 2015.

M. Mbaru

JUDGE

In the presence of:

Lillian Njenga: Court Assistant

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