



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1168 OF 2012

PRAVIN BOWRYCLAIMANT

-VERSUS-

ETHICS & ANTI-CORRUPTION COMMISSIONRESPONDENT

Mr. B.M. Quadrose for the Claimant.

Mr. Edward M. Rinkanya for the Respondent.

JUDGMENT

This suit was brought by way of a Statement of claim dated 10th July, 2012 and filed on the same date.

The Claimant, **Mr. Pravin Bowry** is a former Assistant Director (Legal Services) of the erstwhile **Kenya Anti-Corruption Commission** (hereinafter “KACC”) established under the **Anti-Corruption and Economic Crimes Act, Act No. 3 of 2003**, (hereinafter “ACECA”) now repealed and replaced by the **Ethics and Anti-Corruption Commission Act, Act 22 of 2011** (hereinafter “EACCA”)

The Respondent is the **Ethics & Anti-Corruption Commission** the successor to the Claimant’s employer.

The suit is premised on termination of the Claimant’s employment on 1st September, 2011 on the basis that the office of the Assistant Director (Legal Services) was abolished by the new Act and therefore the employment of the Claimant was no longer tenable.

At the time the Claimant was serving on a five (5) years contract which was due to expire on 30th June, 2015.

The Claimant denies that the position of Assistant Director (Legal Services) was abolished as alleged by the Respondent or at all and puts the Respondent to strict proof thereof. Accordingly, the Claimant alleges the termination of his employment was unlawful and unfair and seeks remedies as against the Respondent particularised on page 5 to 6 of the Statement of Claim items a to o totaling Kenya shillings eighty two million, four hundred and fifty five thousand, seven hundred and fifteen and ninety three cents (Kshs.82,455,715.93).

The amount claimed is on the basis that the Claimant is entitled to remuneration including unpaid

salaries, salaries for the balance of unexpired contractual period between 1st September, 2011 to 30th June, 2015 plus 50% of the remuneration for loss of option to renew the contract, payment of six months salary in lieu of a reasonable notice of six months, 30% gratuity for forty six months, agreed winding up allowance for a period of six months, forty six months allowance for security guards at the rate of Kshs.30,000/- per month, allowance for the unexpired period of forty six months on fuel motor vehicle and driver at the rate of Kshs.50,000/= per month, telephone allowance for the unexpired period of forty six months, cost of medical premiums and annual insurance and a cover for life insurance for the unexpired period of four years, amount due to all out-patient treatment and medicines for the unexpired forty six months for himself and his spouse **Rushmi Bowry**, amount in lieu of leave being one month's salary per year for the four years, proportionate AAR premium for himself and his wife for the period between 29th November, 2011 up to 30th June, 2015, general damages for breach of contract, exemplary and punitive damages.

The Claimant has summarised the prayers sought under paragraph F item 32 of the Statement of claim on page 7 as follows;

- a. *A declaration that the Ethics and Anti-Corruption Commission Act, Act No. 22 of 2011 did not and could not terminate the services of the Claimant.*
- b. *A declaration that the Respondent is in breach of the employment contract entered between the Claimant and its predecessor the Kenya Anti-Corruption Commission and the legal provisions relating to his employment.*
- c. *An order that the Respondent does calculate the full amount due to the Claimant, pay the claimant the net sum claimed of Kshs.82,455,715.93 as outlined in paragraph 30 of the Statement of Claim.*
- d. *An order that the Respondent remit to the Kenya Revenue Authority such tax which is due and payable in respect of the Claimant's employment for the full employment period.*

Reply to Statement of claim.

The Respondent filed a Reply to the Statement of claim on 30th July, 2012 in which it admits the particulars of the parties under paragraphs 1 and 2 of the Statement of claim.

The Respondent in the main, denies that the employment of the Claimant was unilaterally and unlawfully terminated by the Respondent as alleged or at all and puts the Claimant to strict proof thereof.

It is the Respondent's case that the Claimant's employment was terminated lawfully by operation of the law consequent upon the abolition of the office the Claimant occupied under the new legislation governing the Respondent.

That upon that lawful termination, the Claimant was paid all lawful dues owed to him by fact of his employment with the erstwhile employer Kenya Anti-Corruption Commission.

That the entire claim is misconceived and should be dismissed with costs in favour of the Respondent.

Facts not in dispute.

2. The Respondent is the successor of the Kenya Anti-Corruption Commission (KACC) and the transitory provisions of the EACCA under Section 34 and 35 are applicable and therefore in law, the Respondent is answerable for the contractual relationship between the Claimant and the KACC created by law and agreement.

3. The Claimant was in the employment of KACC, the Respondent's Predecessor since 1st July, 2010

holding the position of Assistant Director (Legal Services) having been appointed by His Excellency the President of the Republic of Kenya and his appointment duly gazette vide Gazette Notice No. 8416 and published in the Kenya Gazette Notice of 23rd July, 2010 after a legal process under ACECA which process included advertisement, interview, nomination, parliamentary approval, a contract with the Advisory Board (hereinafter “A.B”) statutorily acting for KACC and then gazette. Physically, the Claimant reported on duty on the 24th of July, 2013 after being sworn in by the Chief Justice twice (See annexures PB-9A and PB-9B on pages 16 and 18 respectively both before and after the promulgation of the Constitution, 2010.

4. The Claimant’s term of service were clearly stipulated and agreed upon by the Claimant and the Respondent vide a letter of offer of appointment dated 3rd February, 2010. (Annexure marked PB-5 at Page 5 of the Claimant’s Statement of Claim bundle). A subsequent letter dated 16th August, 2010 (Marked as annexure PB-8 at Page 17) from the Chairman of the A.B amended the term of the contract of five (5) years in conformity with the Gazette Notice at Page 15 marked PB-7.

5. The Claimant worked during the period he was in employment up to and including the 15th September, 2011 and was ready, willing and able to complete his part of the contract but at the request of KACC through the A.B, the Chairman of the A.B by a letter (See Page 32, PB-16) demanded a handover on the ground that the position of the Claimant was abolished. The Claimant duly replied vide his letter marked PB-17 on Page 34 and a reply of the A.B marked PB-18 on Page 35 and from the outset questioned the stand taken by KACC.

6. It is also a fact that the new Constitution came in force on the 27th of August, 2010, under which the Claimant and thereafter EACCA came into force on 5th September, 2011.

7. A third party obtained an injunction in the High Court Constitutional & Justice Review Division (See PB-23 at Page 36 – 39) citing the Claimant as an interested party.

8. The EACCA amended ACECA and its Section 34 which is a transitional clause reads thus

“Subject to subsection (4), a person who immediately before the commencement of this Act was serving on contract as a member of staff of the Kenya Anti-Corruption Commission, other than the Director and Deputy Directors, shall, at the commencement of this Act, be deemed to be an employee of the Commission for the unexpired period, if any, of the term.

Every person who immediately before the commencement of this Act was an employee of the Government attached to the Kenya Anti-Corruption Commission shall, upon the commencement of this Act, be deemed to be an employee of the Commission for the unexpired period, if any, or the term of the contract.”

Notwithstanding subsection (1) and (2), and before appointing or employing any member of staff of the Kenya Anti-Corruption commission who wishes to work for the Commission, the Commission shall:-

- a. *Require such a person to make an application for employment or appointment to the Commission; and*
- b. *Using the criteria determined by the Commission, vet such a person to ensure that he or she is fit and proper to serve in the position applied for as a member of staff of a Commission.*

9. Section 34 of EACCA does not have the words “Assistant Director” and the designation of “Assistant Director” was found in Section 2 of ACECA.

10. On the 14th September, 2011, by minutes of A.B. dated 14th September, 2011 (See Page 40 – 42 marked annexure PB-22), the AB sought under Section 31 of EACCA (NOT ACECA) an opinion of the

A.G at the time of instituting the claim, the Claimant did not have the said opinion so as to include it in his documents and the Respondent in his Reply stated it was confidential. The Claimant threatened legal action against the Attorney General (hereinafter “A.G”) and the respondent for failure to produce the said opinion which was eventually tendered to the court by a Supplementary List of Documents filed on 4th October, 2012. There is no dispute that the A.G did give an opinion and the said opinion is attached to the Respondent’s Witness Statement of Irene C. Keino (hereinafter referred to as RW-1)

11. It is also undisputed that the A.B held another meeting on the 5th of December, 2011 but the Respondent failed, refused and/or neglected to produce the minutes of the Advisory Board Meeting despite a request and notice to produce.

12. It is also not in dispute that the Claimant has received the net sum of Kshs.3,108,745/= after tax deductions from KACC which was payment in respect of winding up allowance which the Claimant was entitled to at the end of the contract in any event.

13. The Claimant’s appointment was for a fixed term of five years with no termination clause.

14. That the Employment Act No. 11 of 2007 Laws of Kenya is applicable to the Claimant’s claim.

15. There are no averments or allegations that the Claimant breached his contract or otherwise failed, refused or neglected to perform his duties.

16. The relationship between the Claimant and the Respondent was of a contractual nature of employment as provided for in ACECA with all the legal and factual provisions of ACECA having been strictly complied with by the appointing authority and the Claimant. In the Canadian Case of Wells Vs. Newfoundland the Canadian Supreme Court held on page 200 as follows to underscore the contractual relationship;

“While the terms and conditions of the contract may be dictated, in whole or in part, by statute, the employment relationship remains a contract in substance and the general law of contract will apply unless specifically superseded by explicit terms in the statute or the agreement. The terms of such a contract are to be found in the written and verbal manifestations of the agreement, applicable statutes and regulations and the common law.”

17. In cross-examination R.W.1 testified stating that common practice of the Respondent was to pay the salary of any appointee from the date of gazettement and not the date they reported to work and this evidence was not controverted by R.W.2. The Claimant’s claim under paragraph 30(a) therefore stands proved.

18. R.W.1 stated that she was paid from the day of gazettement. PB-5 at Page 5, the 1st paragraph clearly shows that it was agreed that the appointment of the Claimant was to start “from the date of appointment by His Excellency the President” which is 1st July, 2010 as per the Gazette Notice marked PB-7 at Page 15.

19. On quantum there is no dispute that the net monthly amount, in respect of salary, payable to the Claimant was Kshs.754,000/= (after deductions.)

20. It is agreed that claim 30 (d) being the six months Winding Up Allowance has indeed been paid by the Respondent.

The Claimant seeks the relief aforesaid purely on the basis of the undisputed facts and points of law and other matters contained in the written submissions by the Claimant, the court will get back to at a later stage.

Issue in contention.

The Respondent's case is based on several defences but the main thrust of the defence is that the contract between the Claimant and the precursor of the Respondent was frustrated by the operation of the law.

The Respondent therefore submits that all the other claims, entitlements, liabilities and issues involving this claim will flow from the determination of the fundamental issue being the nature of termination of the Claimant's contract.

Frustration of contract

Whereas the Claimant contends that the EACCA did not and could not terminate his contract of service, the Respondent strongly argues that this was the case. The Respondent places reliance on the Constitution of Kenya, 2010 and in particular **Article 79** which provides;

“Parliament shall enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under chapter fifteen, for purpose of ensuring compliance with, and enforcement of, the provisions of this chapter.”

Further reliance is placed on the transitional and consequential provisions – **Section 31 (2)** which provides'

“Subject to subsection (7) and section 24, a person who immediately before the effective date held or was acting in a public office established by law, so far as is consistent with this constitution, shall continue to hold or act in that office as if appointed to that position under this constitution.”

However, **Section 31 (3)** thereof contains the proviso that;

“The provisions of this section shall not affect the powers conferred on any person or authority under this constitution or legislation to abolish office or remove persons from an office contemplated in subsection (2).”

It is the Respondent's case that EACCA repealed part III of the ACECA pursuant to which the Claimant had been recruited and in particular **Section 8** thereof. The Respondent therefore submits that the Respondent's office as an Assistant Director of KACC was rendered non-existent with effect from the date the new Act came into force on 5th September, 2011.

The Respondent submits that **Section 34 (1)** of EACCA aforesaid did not save the positions of the Director and Deputy Directors. In effect therefore the new EACCA specifically excluded directors from members of staff to be retained in the new outfit for their unexpired period, if any of the term.

The Respondent asserts, which is vehemently denied by the Claimant that the term Deputy Directors contained in the Act factually and legally refers to the Assistant Directors as contained in the ACECA and that both terms refer to one and the same office.

The matter is not made easier by the provisions of **Section 8** and **9** of ACECA (now repealed) which provided that;

“8(1) The commission shall have a Director who shall be the chief executive officer of the commission and who shall be responsible for its direction and management.

8(2) The commission shall have up to four Assistant Directors to assist the Director”

Whereas **Section 9** provides;

“9 (1) The Director shall appoint one of the Assistant Directors as Deputy Director.”

The effect of these provisions is to confirm that there was one Deputy Director who was appointed from the ranks of Assistant Directors. The Deputy Director was therefore a senior officer than the Assistant Directors, and the *defacto* number two to the Director.

The question that the court must now answer is whether the new Act, EACCA, whose provisions did not refer to the office of the Assistant Directors can be said to have abolished the office of Assistant Director by inference.

It is submitted further by the Respondent that the omission was an error and the court should read the words “Deputy Directors” to mean Assistant Directors.

For this proposition, the Respondent relied on excerpts of the National Assembly Official Report (Hansard) in order to show the actual intention of parliament with regard to this provision.

Court was referred to the debate by the Members of Parliament recorded in pages 77 to 80 of the Hansard.

The members discussed the fate of the Director of KACC and the “Deputy Directors” at page 78 Hon. Mr. Abdikadir (who was the then chair of the Constitution Implementation Oversight Committee in Parliament) is quoted stating thus;

“Madam Temporary Deputy Chairlady, just one clarification. We have just transited all members of staff except the Director and Four Deputy Directors but I personally have no problem with the amendment that is being proposed.”

It is submitted by the Respondent therefore the debate leaves no doubt that the law makers did not intend any member of the Management Team of KACC who consisted of the Director and four Assistant Directors to transit to the new outfit. That it is apparent that there was an error in the EACC Bill which proceeded through the relevant readings in parliament and final enactment thereof indicating that KACC management team constituted four Deputy Directors instead of four Assistant Directors. The error found its way in the final letter of the EACC Act.

Respondent further submitted that it was the task of the Board to wind up the operations of KACC within ninety (90) days, unless the new Commission came into place earlier.

That the Board advised the Commission generally on the exercise of its powers and the performance of its functions and that the Board discharged this function properly with the regard to the position of the Claimant that his contract had been frustrated and his office abolished with effect from 5th September, 2011.

Opinion by the Attorney General

The KACC Advisory Board sought the opinion of the Attorney General in respect of the contractual situation of the Director and Assistant Directors of the defunct KACC.

The Attorney General gave his opinion vide his letter dated 14th November, 2011 addressed to the Chairman’s KACC Advisory Board attached to the witness statement of Irene C. Keino.

Though in his opinion the Attorney General did not opine that the position of the Claimant was saved he made profound opinions which impact the merits of this claim as follows;

- i. *In the event of premature termination, gratuity would be paid on a prorata basis.*

- ii. *The Ethics and Anti-Corruption Commission Act abolished the Office of the Director and there was no transitional provision to save that office.*
- iii. *The Director was not permitted to be employed in any other work or business hence there was reasonable and legitimate expectation on his part that the five year contract would cater for him adequately.*
- iv. *That the Director accepted the job on the presumption of certainty of law, and the general duty of good faith in the law in the performance and enforcement of contracts.*
- v. *On the matter of frustration of contract, the case of **Relly vs. R. [1934] AC 176 Privy Council**, the appellant was appointed a member of a statutory Board in Canada with a specific term of appointment and salary. During the tenure of the appointment the office was abolished by the repeal of statute establishing the Board. By a petition of Right the appellant claimed damages for breach of contract, but the court held that the contract was discharged because further performance had become impossible by statute.*

On the other hand, the Attorney General relied on the decision in **Numba v Vetsak Cooperative Ltd & Others (1996) 17 KH 445 (A)** at 460; and **Fedlife Assurance Ltd v. Wolfaardt (2001) 12 BLLR 1301 (SCA) para 32** for the proposition that;

“The lawfulness of a termination does not necessarily translate into fairness. It is accepted jurisprudence of labour law that where an unfair dismissal claim is made, it is not a defence to claim that the employee’s dismissal was lawful”

On the basis of the competing authorities, the Attorney General opined that the question of law on the matter is rather narrow and proceeded to say;

“Is it reasonable to strictly interpret the terms of the appointment letter to mean that the winding up allowance was only payable upon completion of the five-year term? In the totality of the circumstances of the cases, it would be prudent to acknowledge that there was reasonable and legitimate expectation of the Director that he would be in the office for a five-year period and it was this expectation that informed the said Director to take up the position.”

The Attorney General further relied on **R vs. the Hon. Chief Justice of Kenya & others** where the court stated as follows;

“It is however also clear that the concept of legitimate expectations like many concepts can be used in more than one way, it does not have to be given a restrictive interpretation thus more recently cases have in principle at least given a broader meaning to that term, utilizing it as the foundation for procedural consultation rights to be given to immigrants workers and local authorities. Thus if an individual is to be deprived of a benefit which was enjoyed in the past and which he could legitimately expect to continue or he has received assurance from the decision makers that such a benefit will not be withdrawn without giving him some opportunity to argue the contrary then in either instances an opportunity for the individual to make representations will be accorded.”

The Attorney General based on the above excerpts concluded;

“In light of the above and in interpreting the spirit of the constitution and as an exceptional case, the EACC Advisory Board should consider paying the Director the winding up allowance in addition to other terminal benefits that are due to him.”

The Attorney General concluded further that the situation of the Assistant Directors – **Mr. Pravin Bowry** and **Prof. Jane Onsongo** was similar to that of the Director **Patrick Lumumba Otieno**. However

that of Assistant Directors **Dr. John Permenus Mutonyi** and **Mr. Wilson K.S. Shollei** is different in that the contracts specifically provided at paragraph (XI) as follows;

“In the event of a premature termination of this contract and abolition of office in a manner not envisaged under the Anti-Corruption and Economic Crimes Act, you will be paid full remuneration for the unexpired balance of the contractual term.”

The Attorney General noted that this difference in contracts of officers of same status and recruited in the same manner was curious and now had placed the Claimant and Prof. Jane Onsongo in great disadvantage upon termination.

The advice from the Attorney General concluded;

“From the foregoing, it is clear that termination of the employment contract for Director and Assistant directors of KACC was by virtue of change in law hence they did not serve their full term. However, in the interests of justice and fairness for these eminent persons who had reasonable expectations of serving the full five-year term as public officers, they should on an exceptional basis and reflecting the special circumstances in this case, be accorded the winding up allowance plus such sum or sums as may be negotiated representing a lump sum compensation for the loss of the legitimate expectation of employment for the unexpired period of the contract.”

It is the Claimant’s case that the Respondent blatantly disregarded the advice by the Attorney General to his loss and detriment hence this suit.

Contention by the Respondent disputed by the Claimant

- i. Liability is denied generally and in toto.
- ii. That the contract between the Claimant and the Respondent was terminated by the ‘operation of law’ by first the promulgation of the Constitution of Kenya, 2010 and then the enactment of the Ethics and Anti-Corruption Commission Act (EACCA) with effect 15th September, 2011 and his office ‘abolished’.
- iii. That under the new enactment payment by KACC of one single payment of the “winding up allowance”, less tax deducted, of Kshs.3,108,745/= constituted final payment and that the Claimant has no claim whatsoever for any other amount and that the claim by the Claimant is “fictitious misconceived and unreasonable”.
- iv. The Respondent states it had no role other than A.B “communicating the position of the law” to the Claimant with effect from 5th September, 2011 when EACCA was born.
- v. The Respondent denies that the Claimant did and in law had legitimate expectation to serve for 5 years and allegedly the doctrine of legitimate expectation has to be weighed by national interests of “other citizens”.
- vi. That the office of the Claimant i.e Assistant Director, with effect from 5th September, 2011 became non-existent and/or was abolished.
- vii. That Assistant Director was excluded from being a staff member and that the term Deputy Directors in the Section 34 (1) of EACCA includes Assistant Director “factually and legally”.
- viii. That the enactment of EACCA abolished the office under which the Claimant was serving.
- ix. The Claimant was not discriminated against in any way.

- x. It is contended that the Respondent has been wrongly sued and that the Claimant should have sued the Parliament and/or filed a Constitutional Reference.
- xi. Payment to Claimant is against public policy and “unlawful;” to pay huge amounts of money and by so doing is barred from lodging any claim, Claimant should have applied for a new job in then new EACC offices.
- xii. That the Claimant suffered no loss or damage at all.
- xiii. The quantum of Claimants dues are denied and questioned.
- xiv. Alternative contention is that the Claimant’s claim is limited to a period of 12 months after 15th September, 2011 when Claimant left employment.

Issues for determination.

1. Was the contract of the Claimant frustrated by virtue of abolition of office?
2. Did deletion of clause (XI) from the contract of service of the Claimant constitute discrimination and therefore unlawful?
3. Is the doctrine of legitimate expectation applicable in the circumstances of the case?
4. What remedies are available to the Claimant if 1 and 2 are ruled in favour of the Claimant?

Issue I

The Claimant has submitted relying on the Canadian Supreme Court decision of *Wells* that the contract of employment, which was on fixed terms was unfairly, unlawfully and illegally terminated by the Respondent.

That the so called frustration of office, by fact of abolition of office was self-inflicted injury by the Respondent. That one could not separate the actions of one arm or Agency of Government from that of the other arm or Agency and seek claim for frustration.

In the *Well’s* case, the Supreme Court Stated;

“The obvious objection to this submission is that self-induced frustration does not excuse non-performance: National Trust Co. V. Wong Aviation Ltd., (1969) S.C.R, 481; G.H.L. Fridman, The Law of Contract in Canada (3rd ed. 1994), at pp. 642 – 43; Chitty on Contracts (27th ed. 1994), Vol. 1, at para 23 – 047. The Crown responds that the separation of powers between the legislative and executive branches means that a legislative act which bars the executive from performing pending contractual obligations does not constitute self-induced frustration, as these branches are independent entities.

The doctrine of separation of powers is an essential feature of our constitution. It maintains a separation of powers between the judiciary and the other two branches, legislature and the executive, and to some extent between the legislature and the executive; see *Operation dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 491; *Fraser v. Public Service Staff Relations Board* [1985] 2 S.C.R, 455. At p. 469.

The government cannot, however, rely on this formal separation to avoid the consequences of its own actions. While the legislature retains the power to expressly terminate a contract without compensation, it is disingenuous for the executive to assert that the legislative enactment of its own agenda constitutes a frustrating act beyond its control.”

The Claimant’s case becomes even more complicated because the legislature did not expressly refer to the office of the Assistant Director in the new legislation.

The Respondent submits that the court should infer the intention of Parliament from the Hansard proceedings and come to the conclusion that indeed the intention of the legislature was to abolish the position of all the Assistant Directors including that of the Respondent.

The court upon perusing the proceedings of parliament was unable to see any expressions relating to the abolition of the office of Assistant Directors. The proceedings refer only to the position of Director and Deputy Director and as stated earlier, there was only one Deputy Director in the erstwhile organization.

In the absence of clear expression by parliament to the effect that it had abolished the office of the Assistant Directors one of which the Claimant held, the court is unable to make such an inference.

Accordingly, the court finds that the office of the Claimant was unaffected by the new legislation and any termination of his employment should have been done if at all strictly in accordance with his contract of employment and the relevant law, including the employment Act, 2007.

The court therefore finds on the issue that his contract was not frustrated by virtue of abolition of office, but the contract was deliberately terminated by the Respondent.

Issue No. 2 – Discrimination.

It is common cause that, and indeed this was confirmed by **Ms. Irene Keino** (RW1) who sat on the Advisory Board of the Kenya Anti-Corruption Commission at the material time in question, that the contracts of service of the Director, Deputy Director and Assistant Director had a specific clause that provided for compensation for the unexpired term in case of premature termination of their employment and that the Board upon deliberations removed that clause in respect of the Claimant's contract of service.

It is common cause as we see from the Attorney General's advice that the clause was retained for Assistant Directors – Dr. John Permenus Mutonyi and Mr. Wilson K.C. Shollei. The result of this was that two Assistant directors received the full remuneration for the unexpired balance of the contractual term.

Ms. Irene C. Keino was unable to explain this disparity in the contracts of public servants employed on the same terms at the same level and for equal work.

In her witness statement she told the court that the Advisory Board upon deliberations on final dues for the Director and Assistant Directors of the defunct KACC resolved to pay the Claimant six months winding up allowance as per his contract and to pay salary up to 15th September, 2011 when the Claimant completed his handing over less statutory deductions in the sum of Kshs.3,108,745/=. This payment is not in dispute. According to her this was done in full and final settlement of the matter.

She however conceded in her testimony before court that the practice of the Respondent was to pay its statutory employees from date of official gazettement of appointment and not from the date of reporting as happened with respect to the Claimant. To that extent she conceded the claim for payment of arrear salary from date of appointment to date of reporting as claimed by the Claimant.

This is yet another aspect of discrimination that had happened with respect to the Claimant.

In this regard, **Section 5 (3)** provides;

“No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employer –

- b. In respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.”**

Whereas **subsection (4)** provides;

“An employer shall pay his employees equal remuneration for work of equal value.”

For purposes of the Employment Act, the statement does not define discrimination but as we stated in the **Industrial Court of Kenya, at Nairobi, Cause No. 1161 of 2020 Veronica Muthio Kioko v. Catholic University of Eastern Africa**, the court would resort to **Article I of Convention No. 111 – Convention Concerning Discrimination in Respect of Employment and Occupation, 1958** which defines discrimination thus;

“For the purpose of this convention the term discrimination includes;

- a. **Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;”**

The Claimant does not identify the exact cause of the discrimination he suffered but the difference in treatment with regard to termination of his contract *vis a vis* his two counterparts named is so profound in terms and financial consequences as to arouse a sense of shock in any reasonable person’s mind.

In absence of any reasonable explanation by the Respondent, the court has no other alternative but to conclude that the motivation for the discrimination, whatever, it may have been on the part of the Advisory Board is unconscionable, for the reason that it is unequitable, unjust and therefore unlawful.

The court is now well covered in this finding by the **Kenya Constitution 2010**, which under **Article 27** provides;

“1. Every person is equal before the law and has the right to equal protection and equal benefit of the law.”

Clearly the Respondent denied the Claimant this constitutional protection by treating officers in the same cadre and station fundamentally different upon termination of their contracts of employment, having been subjected to similar rigorous recruitment process under the repealed statute.

Furthermore **Sub Article 27 (4)** has in addition to expanding the grounds upon which discrimination is based left room for consideration of other grounds for discrimination not specifically named in the constitution by use of the word *“including”*.

It can longer be argued therefore that there is a closed box of grounds upon which discrimination may be based.

The court in the final analysis finds that the unequal treatment accorded the Claimant by the Respondent is unlawful and the Claimant is entitled to the full benefit of clause (XI) omitted unlawfully from his contract to be paid full remuneration for the unexpired balance of the contractual term for reasons not contemplated under the **Anti-Corruption and Economic Crimes Act**, as happened to him.

Furthermore, the court fully embraces the principle of legitimate expectation as espoused by the A.G and by the Supreme Court of Canada in **Wells** case and finds that the principle is fully applicable in the case of the Claimant.

The court notes that for the purposes of effecting this benefit, the only pre-condition in clause XI is that there be a premature termination of his contract and abolition of office in a manner not envisaged by the Act.

Remedies available.

The effect of this decision by the court does not extend to the entitlement to renew the contract which option had not crystallised at the time of termination of the contract and therefore the court will at the outset dismiss any claims by the Claimant predicated on anticipated renewal of contract.

Furthermore, the Claimant having been paid six months net salary representing winding up allowance in terms of the contract of service is not entitled to a further payment in lieu of notice as claimed and this item is also dismissed.

The claim for telephone allowance; provision of security guards; provision of fuel; cost of medical premium and annual insurance; amounts due for outpatient and medicines; amount in lieu of leave; proportionate AAR premiums for Claimant's wife; cost of AAR cover for the unspent term of contract are all dismissed for the reason that these allowances are predicated on actual performance of the contract and not otherwise in the court's view.

The Claimant is after all expected, as he sure did, to mitigate his losses upon termination of his employment by going back to practice as an Advocate of the High Court of Kenya as he had ably done for many years prior to taking up this appointment.

However, the principle of legitimate expectation coupled with the finding by the court on the issue of discrimination entitles the Claimant to the net amount due at the rate of Kshs.750,000/= for the period of forty six months from 1st September, 2011 to 30th June, 2015 as set out under prayer 30 (b) in the statement of claim being net salary and allowances agreed upon on a monthly basis in the sum of Kshs.34,684,000/=.

Furthermore, payment of gratuity is premised on the provision of actual service and in my view, since the Claimant was already paid prorata gratuity upon premature termination of the contract, a proper construction of clause (X) of the contract does not allow the court to grant payment of gratuity for the unserved term of the contract.

As stated earlier, it was conceded that payment of remuneration was to take effect from the due date of appointment vide **Legal Notice No. 841** of 23rd July, 2010. To this end, claim 30 (a) in the sum of Kshs.628,333/= is granted as the same was duly conceded in court by the Respondent.

The Claimant duly presented evidence of unpaid medical bills for himself and his spouse in the sum of Kshs.179,650/=. The Respondent did not offer any tenable defence against this claim and the court grants the amount as claimed under item 30 (n) in the Memorandum of claim.

To this end, the claim by the Claimant succeeds as follows;

- a. Kshs.628,333.00 being unpaid salary from the date of appointment to the date of reporting.
- b. Kshs.34,684,000.00 being salary for the unspent period of the contract.
- c. Kshs.179,650.00 being unpaid medical bills.

Total award 35,491,983.00

Taking into consideration that the payment is accelerated and in a lump sum, that the Claimant has mitigated his losses from the date of termination to-date, the court will not award the prayer for interest.

The Respondent is however ordered to pay the claimant costs of the suit especially because it did not heed the advice by the Attorney General to consider appropriate payment to the Claimant and settle the matter before it was brought to court.

Dated and delivered at Nairobi this 18th day of December, 2013.

MATHEWS N. NDUMA

PRINICIPAL JUDGE