DINAH MUSINDARWEZO..... CLAIMANT

vs

AFRICAN WOMEN\'S DEVELOPMENT AND COMMUNICATION NETWORK (FEMNET).....RESPONDENT

RULING

By a Notice of Motion dated 14th August, 2012, brought under certificate of urgency, the claimant/applicant sought among others, orders that:

1. An injunction restraining the respondent from terminating the claimant\'s employment.

2. An order for reinstatement of the claimant

3. A declaration that the letters issued by the Chairperson of the Respondent terminating her employment contract were issued un-procedurally, without, consultation, in breach of policies and in breach of the rules of natural justice and were hence null and void.

4. A declaration that the Chairperson cannot unilaterally terminate the services of the claimant without the consensus of the entire Executive Board.

The application was supported by the affidavit of the claimant sworn on 14th August, 2012. In her affidavit the claimant deponed that she was employed by the respondent as the

Executive Director with effect from 1st December, 2011 for a period of three years and that her employment was subject to 6 months probation period. As a consequence of accepting her appointment, the claimant stated that she resigned her permanent job in Rwanda to take up her appointment with the respondent.

She further depones that the respondent\'s personnel policy guidelines and terms and conditions of service amended October, 2010 provided that the Executive Director shall be appointed by the Board of Directors and that under clause xxi a written evaluation would be carried out one month before the end of the probation period. Based on the evaluation employment may be confirmed, discontinued or the probation period extended. Where the confirmation is positive, confirmation of appointment shall be in writing to coincide with the end of the six month\'s probation period.

According to the claimant she performed her duties well and was steering the organization well and had achieved what she described as tangible milestones in her role as Executive Director. However her quarrel was that the respondent in breach of the personnel policy, guidelines and terms and conditions of service failed to carry out the evaluation as required by 1st May, 2012 despite her request for the same to be done. She was however informed to continue working which according to her implied her employment would be confirmed when the evaluation was eventually done.

The claimant states that she carried out a self-evaluation on 22nd June, 2012 and submitted the same to the Chairperson of the Executive Board of the respondent but according to her the Chair of the Board in breach the personnel policy, guidelines and terms and conditions of service failed to circulate her self-evaluation to all members of the Executive Board.

She further deponed that on 16th July, 2012 the Chairperson of the Board without having sought and obtained consensus from the other Executive Board members on her self-evaluation issued a letter terminating her services as Executive Director and gave one month\'s notice of termination expiring on 15th August, 2012.

According to the claimant the procedure used in the evaluation and the termination was flawed and predetermined and that she was neither given a copy of the report prior to the meeting to discuss the findings of the evaluation nor given an opportunity to respond to the same.

In response to her complaint about the process of evaluation and termination, a Board meeting consisting of 5 members including 3 members of the Executive Board and 2 members of the Board of Trustees was subsequently convened on 25th July, 2012 to discuss her termination and it was resolved that the Board members should reconsider the evaluation and give their feedback by close of business on Friday 3rd August, 2012. In reconsidering the evaluation, the Board members were asked to look at the claimant\'s letter of appointment dated 3rd October, 2011, duties of the Executive Director as laid down under article 30 of the respondent\'s constitution, the handing over notes given to the claimant in December 2011 when she joined the respondent, report of the appraisal process dated 16th July, 2012, the claimant\'s self-appraisal, her response to the report of the self-appraisal dated 19th July, 2012, feedback from Board members on the appraisal process and the Chairperson\'s letter on the appraisal process and feedback from programme heads.

The claimant complained in her affidavit that the Chair without further reference to her emailed a letter dated 10th August, 2012 reiterating the decision to terminate the claimant\'s contract. According to the claimant the decision by the Chair was unilateral and without the consensus of the Board and the Secretary prompting the latter to send an email to the Chair complaining that communication regarding the re-evaluation had been sent to only two Board members and not the rest.

The respondent in its affidavit in reply filed on 13th September, 2012 sworn by one Mary Okioma who described herself as the resident trustee refuted the claimant\'s allegations asserting that the entire suit and the application was misconceived, superfluous and a waste of the court\'s time. The respondent contended that the claimant\'s suit is incompetent and bad in law since the claimant\'s employment on probation commenced on 1st December, 2011 and terminated on 16th July, 2012 implying the claimant had worked for a period of less than 8 months and as such the suit did not lie by virtue of the provisions of section 45(3) of the Employment Act, 2007.

The respondent refutes the assertion that the claimant performed her duties well and asserts that her tenure was riddled with poor performance, insubordination and undermining her employer, deliberate failure/rejection to implement decisions of the Board and performing duties unprofessionally, without consultation at all and in total contradiction and disregard of laid down procedures, practices and decisions of the organization. The respondent demonstrated such instances in the replying affidavit. The main accusations against the claimant included:

- Unsatisfactory performance in day to day management and administration of the secretariat and affairs of the network contrary to article 30(1) of the constitution. The claimant is accused of having trouble performing this task on key events during the probation period. It was alleged that the Board Members rated her facilitation of meetings at the African Union and United Nations Commission on status of Women 2012 in New York as poor.

- Lack of adequate consultation with Board members and senior staff. With regard to this, the claimant was accused of sending a program officer for advocacy to UN Women Board meeting without consulting the relevant officers.

- Unprofessional in the implementation of article 30(2) of the respondent\'s constitution which required her to ensure the minutes of all meetings of the respondent were properly recorded.

- Failure to seize opportunities to raise funds for the organization as required. Here the claimant is accused of failing to follow up an offer for partnership with a Nairobi based NGO for purposes of putting up a center for the mutual benefit of the two organizations

The respondent denies that the claimant was ever given or promised confirmation of employment. It however acknowledges that the evaluation process was late by almost a month due to a combination of factors beyond the respondent\'s control, the exigencies of work and delays partly caused by the claimant. The implication was that the probation period was extended by the conduct of the parties.

Concerning the claimant\'s appraisal, the respondent deponed that there was no provision anywhere in the respondent\'s constitution that an employees appraisal ought to be circulated to members of the Executive Board. The respondent stated that since Board members come from all regions in Africa it has been the practice of the respondent that an appraisal team led by the Chairperson carries out the Executive Director\'s appraisal on behalf of the Board. In the claimant\'s case, it is deponed that the chairperson invited the entire Board to give their views and recommendations on the Executive Director\'s appraisal by way of email sent on 18th June, 2012 **(MO 12)** and majority of the Board members who responded recommended that the claimant should not be confirmed. **(MO13).**

It is the respondent\'s position that the claimant\'s appraisal was discussed with her and feedback from staff and Board members shared with her and given an opportunity to make comments. These comments were captured at page 5 of the report on the claimant\'s appraisal **(MO14)**

The claimant in her further affidavit filed in court on 27th September, 2012 questions the capacity of Mary Okioma, the Resident Trustee to swear an affidavit on behalf of the respondent. It was the claimant\'s contention that there being no Board resolution authorizing her to swear the affidavit on behalf of the respondent, she lacked capacity to do so. It was the claimant\'s position that the role of Mary Okioma as a resident trustee was to act as a liaison between the Executive Board and the Board of Trustees. The claimant further states that her appraisal ought to have been done only by the Executive Board members and not members of the Board of Trustees. The claimant further questioned the authenticity of the alleged tabulation of feedback from Board members (MO14) contending that there was no proof that the responses contained therein were from the individual Board members and that it does not indicate when the responses were sent.

During the hearing of the motion counsel for the parties defended their respective positions with the counsel for the claimant Mr. Gathaiya submitting that they sought the court\'s intervention in restraining the respondent from terminating the employment of the claimant and urging the court to order her reinstatement. Counsel further submitted that his client was seeking a declaration that the letter issued by the chairperson of the respondent terminating the claimant\'s services was unprocedural and without consultation and a breach of respondent\'s policies and a breach of rules of natural justice. It was the claimant\'s counsel\'s contention that the chairperson could not unilaterally terminate the services of the claimant without consultation of the Board.

According to claimant\'s counsel, the claimant assumed duties as Executive Director on 1st December, 2011 and was to be on probation for 6 month\'s. A written evaluation was to be done of the claimant by the respondent one month prior to the expiry of the probation period and the decision to confirm the claimant or not or extend the period of probation was to be done in writing. It was counsel\'s submission that the respondent failed to carry out the evaluation as required by 1st May, 2012 despite request by the claimant. The respondent instead asked the claimant to continue working. Counsel consequently submitted that this request to continue working amounted to confirmation of the claimant\'s contract and he urged the court to so find.

Counsel for the respondent Mrs. Gichuhi on her part submitted that the appraisal was delayed for a month and that the applicant continued to work. It was her contention that section 42(2) of the Employment Act,

2007 provided that probation period should not exceed 6 months but may be extended for a similar period with the consent of the employee. According to counsel both parties agreed by conduct to extend the probation meaning as at the time of the claimant\'s termination, confirmation of employment had not taken place.

Counsel further submitted that the claimant having served for only eight months her claim for unfair termination did not lie since section 45(3) of the Employment Act allows only employees who have worked for more than 13 months to bring a claim for unfair termination.

Regarding the capacity of Mary Okioma to swear the replying affidavit, counsel drew the courts attention to paragraph 2 of the her replying affidavit which cited articles 24, 25 and 26 of the respondent\'s constitution which she submitted allowed the respondent to swear the replying affidavit on behalf of the respondent.

Regarding the allegation by the claimant that she did not participate in the appraisal process, counsel submitted that the self-appraisal (DM3) demonstrated that she participated in the appraisal.

According to counsel the claimant\'s letter dated 19th July, 2012 regarding her termination was circulated to Board members and feedback sought. A meeting was subsequently called on 25th July, 2012 at which it was resolved that the appraisal process was carried out properly and issues raised by the claimant in her letter aforesaid did not affect the decision to terminate her. Counsel submitted that the Board members based their reasons on the performance of the claimant which the majority felt was below expectation and that the few Board members who were for the claimant\'s confirmation did not base their view on the claimant\'s performance.

Respondent\'s Counsel firmly submitted that the claimant should not be reinstated and that court should not grant the injunction sought for to do so would defeat the purpose of probation clause.

According to counsel, injunction could only be granted if the loss could not be compensated by way of damages. In the counsel\'s view the loss to the respondent by the continued presence of the claimant cannot be compensated by damages while the loss to the claimant if any, is capable of compensation by damages.

Having attempted to briefly summarize the main points that form the basis of the dispute before this court the questions I have to make a finding on are:

1. Was the claimant\'s appointment confirmed when she was asked by the respondent to continue working after the respondent failed to conduct her appraisal one month before the expiry of her probation period as stipulated by respondent\'s constitution and personnel policy?

2. Second, in conducting the claimant\'s appraisal, did the respondent follow the procedures laid down by the respondent\'s constitution and personnel policy?

3. Was the respondent justified in declining to confirm the claimant\'s appointment?

4. If the answer to the above question is positive? What is the appropriate remedy the court should order in the circumstances?

However before dealing with these issues, two questions ought to be resolved as preliminary one whether the claimant having served the respondent for less than thirteen months has the competence to bring an action for unfair termination and second the whether Mary Okioma had the capacity to swear the replying affidavit on behalf of the respondent.

A finding on the first issue is critical as it goes to competence of the suit and if it succeeds there will no need to delve into the other issues and on the second question, the issue is critical because should the court find that Mary Okioma lacked the capacity to swear the affidavit on behalf of the respondent all the

issues deponed to in her affidavit will be ignored by the court implying the allegations in the claimant\'s affidavit in support of the application become uncontroverted.

Section 45(3) of the Employment Act, 2007 provides that an employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated. Implying that if an employee has worked for less than thirteen months they cannot bring a claim on the issue of unfair termination. This provision does not however prevent an employee who has served for less than thirteen months or whose contract of employment was for lesser period from bringing an action for wrongful termination. The claimant in addition to alleging that her termination was unfair is also questioning the legality of her termination. Implying she would like this court to delve into the process of her termination and come to a finding that it was in breach of her contract of employment, the respondent\'s constitution and personnel policy. To this extent the claim is competently before the court.

That aside constitutionality of section 45(3) has been questioned by my brother Justice Lenaola of the High Court in the case of Samuel G. Momanyi v The Hon. Attorney General & Another. High Court, Constitutional and Human Rights Division Petition No. 341 OF 2011.

Justice Lenaola observed in that case where the applicant claimed he had been discriminated by the provisions of section 45(3) that the Employment Act was enacted in 2007 before the enactment of the 2010 Constitution of Kenya and therefore there was need to align the provisions of all statutes enacted prior to it with the said Constitution. The Judge held that in view of Articles 27 and 48 of the Constitution which guaranteed equality and freedom from discrimination and the right to access to justice, there was obvious discrimination and the petitioner had been denied equal protection and equal benefit of the law.

The Judge observed that no explanation had been given by either Transami or the Attorney General as to why a person who had worked for one year and one month was the only one who could have claimed that his employment had been unfairly terminated and that one who had worked for a lesser period could not have had the benefit of that claim. Judge Lenaola relied on ***Cradle V Attorney General [2006] eKLR***where it was stated that when considering whether a section of the law was discriminatory, the court must have taken into account the history and Social Economic context of the legislation, in other words, the environment in which the legislature had enacted the statute. The Judge therefore found that the repealed Constitution did not have as much a robust bill of rights as the Constitution 2010 and there was need for all laws to conform to it. The Judge further observed that the objects of the preamble of the Employment Act 2007 could not have been met when section 45(3) of the same Act was left to stand in our statute books.

The Judge therefore proceeded to hold that section 45(3) was unreasonable and had the opposite of what the object of the Employment Act was intended to be. The sentiments are highly persuasive and I will not hesitate to associate with them.

Concerning the second issue, the deponent has cited articles 24, 25 and 26 of the respondent\'s constitution as the enabling provisions for her authority to depone on behalf of the respondent.

Article 24 provides for the composition of the Board while article 25 provides for the functions of the Board. Article 26 provides for the duties of the Resident Trustee. Mary Okioma has deponed that she is the Resident Trustee hence it would be important to look into her functions to see if she has the competence to swear an affidavit on behalf of the respondent. Article 26 provides:

Article 26: Duties of the Resident Trustee

1. The Resident trustee shall have the following duties:-

i. Represent the Board of trustees in-country and be the liaison person between the Regional Secretariat and the Board of trustees on matters relating to the functions of the Board.

ii. Work with the Executive Director to ensure that the provisions of the Finance Policy and Procedures Manual are upheld to support the investment plans of the Network.

iii. Be a signatory to the accounts of the Network.

iv. Act as a liaison person between the Government of Kenya and the Regional Secretariat.

v. Provide leadership in resource mobilization for investment projects of the Network.

vi. Report to the Board of trustees on any activity carried out relating to the properties and investments of the Network.

vii. Take up any duties that may be assigned by the Regional Secretariat, Executive Board, the treasurer or the Board of Trustees.

The closest provision which could be interpreted to give authority to the Resident Trustee to sign court papers on behalf of the respondent is article 26(vii) which provides:

viii. Take up any duties that **may be assigned by the Regional Secretariat, Executive Board,** the treasurer or the Board of Trustees. (emphasis added).

The day to today operations of the respondent are overseen by the Executive Board. This Board is the one that is tasked with the recruitment of the CEO among other responsibilities. The Resident Trustee being a member of that Board can be assigned by the Board to take up any duty which in the Court\'s view includes swearing the affidavit in question. But the question would be: How is the assignment done? Would it take the form of a an instrument or can it be done orally?

Blacks Law Dictionary defines assignment as: To convey; to transfer rights or property. Concise Oxford Dictionary however gives a more elaborate definition it states: to allocate(a task or duty) to someone, appoint to a particular task. In practice of organizations allocation of tasks or duties is usually done by way of a letter or instrument of appointment and where there are Boards like in the case of the respondent this would usually be by way of a Board Resolution or minutes. To the extent that no such Board resolution or minutes have been exhibited, the Court finds that Mary Okioma lacked the capacity to swear the affidavit on behalf of the Board. But the question then is, would this render the matters deponed to in her affidavit of no consequence to the application? The answer would be no. First, this Court is enjoined by the Constitution to do substantial justice to the parties without undue regard to procedural technicalities. The operating word here is undue regard. The Constitution does not say procedural technicalities should be overlooked but that undue regard should not be paid to them especially where no prejudice will be occasioned to the parties. Procedural technicalities are necessary especially where they bring order in processing and prosecution of cases. Without them litigation would be chaotic and open to abuse. Second Mary depones in paragraph 4 of her affidavit that she is fully conversant with matters concerning the entire organization and those relating to the suit. She is a member of the Executive Board and one of the persons who was involved in the recruitment and appraisal of the claimant. To this extent she is somebody who is conversant with the issues in dispute as an individual and thus competent to swear the affidavit. This therefore resolves the issue concerning the competence of Mary to swear the affidavit on behalf of the respondent. I now turn to the questions I framed for determination.

1. Was the claimant\'s appointment confirmed when was she asked to continue working after the respondent failed to conduct her appraisal one month before the expiry of her probation period as stipulated by respondent\'s constitution and personnel policy?

By a contract of employment entered into on 24th day of October, 2011 between the claimant and the respondent, the claimant was to assume the position of Executive Director of the respondent with effect from 1st December, 2011. The appointment was subject to a six months probation on the expiry of which the contract could be confirmed in accordance with the provisions of the Personnel Policy. The relevant portion on probation provides:

“... A probation period of six months for staff members in categories 1 and 2 and three months for those in category 3 and 4 shall apply.... A written evaluation shall be carried out one month before the end of the probation period. Based on the evaluation, employment may be confirmed, discontinued or the probation period extended. Where evaluation is positive, confirmation of appointment shall be in writing to coincide with the end of the six months or three month probation period..”

The claimant\'s employment commenced on 1st December, 2011 therefore her appraisal was due by 1st May, 2012.

It is not in dispute that the claimant\'s appraisal was not done within the period stipulated in the respondent\'s Personnel Policy, Guidelines, Terms and Conditions of Service. Section 42(2) of the Employment Act stipulates that a probation period shall not be more than 6 months but it may be extended for a further period of not more than six months with the agreement of the employee.

The claimant\'s having assumed office from 1st December, 2011 therefore her six month probation ended to be exact, on 1st of June, 2012. She however remained in office and continued to discharge her duties until her services were terminated on 16th July, 2012 which was one month fifteen days after the expiry of the probationary period. It is an acceptable principle of law of contract that parties to a contract may by their own conduct vary or extend a term or the entire contract. Whereas the Employment Act provides that probationary period may be extended for a period not exceeding six months with the consent of the employee, the Act does not specify how such consent should be evinced. It is therefore open to a Court of law to infer such consent based on the circumstances of each case. It is a practice that ought not to be encouraged especially where the initial contract was in writing. The Court therefore finds that the claimant and the respondent by their own conduct extended the probation period indefinitely pending the appraisal but subject to the statutory ceiling of six months.

Appraisal as per the respondent\'s Personnel Guidelines and Policy was an essential step in confirmation or otherwise of the claimant\'s contract. Although the Personnel Policy and Guidelines required it to be done one month prior to the expiry of the probation period,omission to do so would not necessarily result in automatic confirmation of an employee. Appraisal is a popular human resource management tool used by most organizations to measure performance of staff especially those in senior positions as the claimant,for purposes of continuously assessing their suitability and output against set targets and organization\'s goals. It is akin to performance contracting now popular with governments across the world. The contention by the claimant that her confirmation became automatic when the mandatory period of carrying the appraisal had lapsed therefore fails.

The next question the courts seeks to consider and make a determination on is whether in conducting the claimant\'s appraisal, the respondent followed the procedures laid down by the respondent\'s constitution and personnel policy as well as rules of natural justice.

Clause 8 of the Respondent\'s personnel policy and guidelines provides that the Executive Director shall be evaluated by the Executive Board. This clause on strict construction may be found not to apply to probationary employees. It is an annual appraisal to assess the extent to which staff members have achieved the set targets, as well as level of adherence to the policies and procedures of the organization and promotion of its principles and values. Probationary employees have barely served the organization for six months hence cannot be subject to annual appraisal perhaps the respondent may need to consider amending this clause to give clarity on the issue of probationary employees. The court will however assume that reference to this clause in connection with probationary employees is being done with necessary modification *(mutatis mutandis)*

The Executive Board that is tasked with appraising the Executive Director comprises of:

The Chairperson;

The Treasurer

Vice-Presidents for each the five sub-regions. That is one representative from West Africa, Central Africa, North Africa, Eastern & Horn of Africa and Southern Africa.

The ex officio members of the Board are immediate Chairperson of the Network; The Chairperson of the Board of Trustees and the Executive Director.

At first meeting of the Board one member shall be appointed to be the Secretary and shall liaise with the Executive Director to ensure that all records of the meetings and business of the Executive Board are properly kept.

As far as the court can extract from the affidavits and documents filed with the pleadings in this matter, the members of the Board who appeared to have participated in the appraisal of the claimant include Sylvie Jacqueline Ndongmo- Chairperson, Souad Belaazi- Vice-Chair, Imane Belghiti, Mrs. Mama Koite Doumbia, Mrs. Ndeye Astou Sylla, Navigue Celestine, Mary Okioma, Emma Kaliya, Patricia Munabi Babiiha and Sally Chiwama.

The claimant conducted her self-appraisal on 22nd June, 2012 and her services were terminated by a letter dated 16th June, 2012 **(DM4)**. The letter read in the relevant part as follows:

"...based on the feedback received from the Board members and program heads during the appraisal process, we have found it necessary to terminate your services..."

The date of this letter appear to have been erroneous since in the body of the letter the claimant is being advised that her services are terminated with effect from "...today 16th July, 2012." The claimant too has deponed that her services were terminated on 16th July, 2012. The court will therefore take 16th July, 2012 as the correct termination date.

By an email sent to generalboard@femnet.or.ke on 18th June, 2012, the respondent\'s Chairperson forwarded an appraisal form which she stated should guide the appraisal process in accordance with the respondent\'s personnel policy and the contract between the claimant and the respondent. The addressees were however advised that they were free to use their own format.

Upon receipt of the termination letter aforesaid, the claimant made a detailed response to it in which she attempted point by point response to issues that arose in her appraisal. In this letter she requested that the issue of her termination be handled through a just process within the rules and regulations of the organization and according to the rules of natural justice by specifically requesting that she be given opportunity to present her case as she found herself aggrieved without the possibility of any response. This letter was never responded to by the respondent.

In what is headed "Report of Dinah Musindarwezo\'s appraisal" dated 16th July **(MO14)** a point by point response was made to the claimant\'s appraisal contrasting it with what is described as the feedback from Board members. It concludes by stating "...based on our observations and feedback received from Board members and program heads, we have found it necessary to terminate the ED\'s contract..." This "report" is neither signed nor is its authorship and audience disclosed. It is however noteworthy that it is dated the same day as the termination letter.

It is this report that triggered the meeting of 25th July, 2012 at Panafric Hotel in which five Board Members were in attendance. These were Sylvie Ndongmo, Mary Okioma, Patricia Munabi Babiiha, Sally Chiwama and Soulad Belaazi. The minutes of the said meeting while acknowledging the opportunity presented by Open Forum for CSO Development Effectiveness for the five Board members to meet, it neither record\'s whether the other members absent were duly notified and they sent any apologies or why their attendance to this crucial meeting could not be procured.

Minute 2/2012 of the Panafric meeting is recorded as follows:

" The Chairperson noted that a number of Board members found consultation on the appraisal process

inadequate...”

Minute 6/2012 is recorded as follows:

“...Board members had a lengthy discussion on the best way forward. Some members felt that the Ed had not met even the minimum standards required of an Ed at FEMNET while other members felt that the Board needed to weigh the issues raised in the appraisal and see whether these are not issues that can be dealt with and should simply let some of the issues pass since no one is perfect, identify specific issues for her to work on and extend her probation and the reassess her...”

It is further minuted that the “Board members to consider the following documents and give their final feedback on whether or not we are confirming the Ed by close of business on Friday 3rd August, 2012...The meeting then agreed that the Chairperson would consolidate the feedback received from the Board members into a final decision and share it with the ED and Board members by close of business on 6th of August, 2012.”

Pausing here the question the Court would like to ask is: what was there to confirm if the claimant\'s contract had been terminated by 16th July, 2012 and was merely serving the notice period?

By a report dated 10th August, 2012, the Chairperson presented a writeup pursuant to the resolution of the Panafric meeting. This write up appears to reconfirm the earlier position by some Board members that the claimant\'s be not confirmed. It also appears to defend that position while arguing out a case against other Board members who had a contrary opinion.

The document marked **MO15** attached to Mary Okioma\'s affidavit headed “Second table for Board Members comments” is quite instructive here. It has a total of fourteen respondents half of which favoured non confirmation of the claimant while half favoured it.

Respondent number 2 for instance states as follows:

“...As stated in one of my earlier emails, there was a gap at the end of the appraisal process as the results of the process were not shared with the Board members to enable collective decision making...From reading the appraisal report again I think most of them are not major and are issues that can be worked around...”

And respondent 7 states:

“ I have again noted though that some of us were giving very generic/sweeping statements that someone who is well vest (sic) with issues could easily challenge because they do not seem to be based on factual evidence as they lack sincerity and objectivity... I noted certain things became very personal i.e the issue of dressing, really at the age of Dinah, do we really think we can be regulating her dressing, that is really overstepping our mandate... what precedence are we setting, that each time we have some challenges with ED\'s, the solution would be terminating their contracts or letting them get frustrated and leave on their own so that FEMNET is not held responsible for their departure while they go out there to damage our reputation and image of the organization...”

This document ties and or confirms the issues raised by the Secretary Emma Kaliya, that the process of appraising the claimant\'s and her eventual termination was not consultative enough and that no consensus had been reached regarding non-confirmation of the claimant.

From the facts I have adumbrated above and my analysis thereon, this Court is not persuaded that the decision not to confirm the claimant was reached in a collegiate and consensual manner or at least by the majority of the Board.

The Executive Board is empowered by the Respondent\'s Personnel Policy, Guidelines and terms and conditions of service to employ the Executive Director therefore by parity of reasoning it is the body that

is best placed to confirm or terminate the Executive Director\'s services. So when the termination letter states that “...we have found it necessary to terminate your services...” against a background of a Board torn into half over whether or not to confirm the claimant, the question that arises is: Who is the “we” referred to in the termination letter? Is it the Board? Definitely not from the foregoing. Is it the Chair who signed the letter, the Resident Trustee and Secretary to whom the letter was copied to? But again the Secretary has disputed the decision to terminate the services of the claimant. So question remains unresolved.

The claimant has lamented before this court that she was not given an opportunity to be heard and to respond to the appraisal process that led to her termination. As already pointed out, the report on the claimant\'s appraisal was released concurrently with her termination letter. This cannot by any manner of construction be understood to be a fair opportunity to the claimant to respond to the allegations against her.

Under section 45(1) of the Employment Act no employer shall terminate the employment of an employee unfairly. Subsection (2) of the said section provides that a termination of employment by an employer is unfair if the employer fails to prove that the reason for the termination is valid; that the reason for the termination is a fair reason related to the employees conduct, capacity or compatibility; or based on the operational requirements of the employer; and that the employment was terminated in accordance with fair procedure.

The absence of the conjunction “or” in subsections 2(a) and (b) gives the implication that subsections 2(a),(b) and (c) must all be met before any conclusion can be reached that the termination was fair. That is to say an employer must not only show that the reason for termination is valid but must also demonstrate that the reason for termination is a fair reason related to the employees conduct, capacity or compatibility and that the employment was terminated in accordance with fair procedure. Any other interpretation would yield absurd results since reason for termination may be valid but unfair in terms of procedure followed or when one considers the employees conduct or any other circumstance that yielded the reasons for termination.

It has long been settled under the “golden rule” of interpretation that the ordinary or literal meaning of the words of a statute must be adhered to, unless to do so would lead to absurdity, or would be at variance with the intention of the Legislature. Thus where the language of the statute is ambiguous, the court is entitled to construe it so as to avoid an absurd result.

The foregoing is confirmed by the positive provisions of section 45(4) of the Act that states that a termination of employment shall be unfair for the purposes of this Part where it is found out that in all the circumstances of the case, the employer did not act in accordance with ***justice and equity*** in terminating the employment of the employee. Justice and equity are broad terms and can encompass a broad compendium of issues and circumstances that may require to be considered before a termination is arrived at.

The provisions of section 45 perhaps form some of the pillars of employment protection mechanism that were contemplated by Parliament when it enacted the Act in 2007. It is clear departure from the previous Employment Act cap 226 (now repealed) that did not oblige an employer to delve into the fairness in substance and procedure of termination of employment. Under the old Act the employer was under no obligation to assign a reason for termination provided the requisite notice as per contract was observed in terminating the contract.

The right to fair hearing is one of the fundamental principles of natural justice and fundamental to fair procedure. It is underpinned by the principle that both sides should be heard. The right to fair hearing has been used by courts as a basis on which to build a kind of fair administrative procedure comparable to due process of law. Bodies entrusted with legal power cannot validly exercise such power without first hearing the person who would suffer by the exercise of that power.

Even in cases where the order or determination is unchallengeable as regards its substance, the court can

at least control the preliminary procedure so as to require fair consideration of both sides. Straying from the path of rectitude is one of the frequent mistakes of ordinary mortals that we all are. Where natural justice is violated it is no justification that the decision was in fact correct.

Lord Denning in the case of **Abbot vs. Sullivan (1952) 1 KB 189 at p198** observes:

"... bodies which exercise a monopoly in important sphere of human activity with power of depriving a man of his livelihood must act in accordance with elementary rules of justice. They must not condemn a man without giving an opportunity to be heard in his own defence and any agreement or practice to the contrary would be invalid.

The claimant was at the mercy of the Board and their decision whether or not to confirm her would obviously affect her livelihood. Such a decision therefore must be seen to be unequivocal and reached after following rules of natural justice the critical one of which is giving the claimant a fair hearing.

Traditionally employment relationship which was condescendingly referred to as Master-Servant relationship, has been of a personal in nature almost equated to a marriage relationship. Keeping such a relationship where parties have fallen out sometimes present a challenge to the Courts when considering specific performance or reinstatement. However employment relationship has evolved in modern times creating ties that make it difficult for an employee to change occupations or employers. Employers too are finding it more difficult to terminate this relationship with an employee.

Justice Ojwang captures this scenario more poignantly in case of **Menginya Salim Murgani v Kenya Revenue Authority HCCC No. Civil Case 1139 of 2002** reported in **2008 e-KLR** when he states that:

"In so far as the employee spends the bulk of his or her time in the service of the employer, littleother livelihood, in most cases, is earned by the employee outside the framework of the employment relationship. Of this fact, this Court takes judicial notice; and it must then be considered that the status quo of the employment relationship, inherently vests in the employee both normal rights, and legitimate expectations."

The claimant resigned her permanent job in Rwanda and relocated to Kenya in the honest belief that while performing her duties as required and subject to appraisal process she would serve the respondent for at least 3 years. Terminating her services on account of underperformance especially in heels of a successful interview in which the Court would want to believe she emerged the best is not impossible but must be done fairly and with a clear consensus of the Executive Board or at least a significant majority thereof.

It has been argued that the damages can adequately compensate the claimant in the event that she ultimately proves her termination was unlawful and unfair, however the court is not of the view that simply because damages can adequately compensate a person an injunction cannot issue. Such a scenario would mean that provided a person is rich enough and can pay damages he can go ahead and act contrary to procedures laid down by herself and or act contrary to substantive and procedural fairness simply because they can pay. This in the court\'s view is an erroneous interpretation of the principles governing the grant of injunctions. The Court in appropriate and compelling circumstances can grant an injunction even where damages would suffice if the wrong complained against is eventually proved.

In conclusion this court finds that the appraisal process that culminated in the termination of the claimant\'s employment did not follow fair administrative procedures, was non-collegial and lacked consensus of the Executive Board. In the circumstances the claimant has made up a prima facie case with probability of success against the respondent and merits the confirmation of the interim injunction until the hearing and determination of her claim.

If terminating the claimant\'s services is what is considered to be in the best interest of the respondent, the Executive Board who is reposed with such power can go ahead and do so provided it is done in a collegiate manner and with a clear consensus of the Board and subject to observance of rules of natural

justice generally and more particularly as provided for under section 45 of the Employment Act, 2007. It so ordered.

Dated at Nairobi this 18th day of October 2012

Jo Abuodha
Judge.

Delivered in open Court this 18th day of October 2012

Mr. Gathaiya..... For Claimant

Mrs. Gichui ..... For respondent