



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 431 OF 2015**

*(Before Hon. Justice Mathews N. Nduma)*

**EVANS ARTHUR MUKOLWE.....CLAIMANT**

**VERSUS**

**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**KENYA WILDLIFE SERVICE.....2<sup>ND</sup> RESPONDENT**

**J U D G M E N T**

1. The suit commenced by a plaint filed in the year 2005 but is now based on a second further amended memorandum of claim dated 28<sup>th</sup> August 2015 and filed on 11<sup>th</sup> September 2017.

2. The claimant seeks the various reliefs set out and particularized under paragraphs 12 and 13 of the Amended Memorandum of Claim with the final prayers being as follows:

The claimant prays for judgment against the Respondents jointly and severally for payment of:

(a.) Kshs. 1,427,048,000

(b) In the alternative the court to order for the claimant's immediate unconditional reinstatement without loss of benefits and payment of salary and allowances at the rate of Kshs. 1,095,689 per month from 12<sup>th</sup> November 2004 until reinstatement and/or judgment.

(c) General damages

(d) Exemplary and punitive damages.

(e) Cost and interest on (a), (b), (c), and (d) above.

(d) Any other relief the court may deem fit to grant

3. The 2<sup>nd</sup> defendant, KWS, filed reply to Amended Memorandum of Claim, set off and counter claim dated 3<sup>rd</sup> February 2016 on 3<sup>rd</sup> February 2016 in which it has denied all particulars of claim and reliefs sought by the claimant and the claimant is put to strict proof thereof.

4. The 2<sup>nd</sup> respondent further counterclaims a sum of Kshs. 9,607,196 from the claimant particulars of which are set out under paragraph 23 and 24 of the reply -set-off and counter claim. The 2<sup>nd</sup> respondent prays that the counter claim be granted and set-off against any award made in favour of the claimant.

**1<sup>st</sup> Defendant's Statement of defence.**

5. The 1<sup>st</sup> defendant, the Hon. Attorney General filed a statement of defence to the suit on 13<sup>th</sup> April 2005 in which the claim by the claimant is denied in total and prays that the suit be dismissed with costs.

**Facts not in dispute**

6. The claimant was appointed to the position of Director of KWS by the president of the Republic of Kenya, Hon. Mwai Kibaki on 3<sup>rd</sup> October 2003. The appointment was gazetted in Gazette Notice No. 709 pursuant to Section 3(2) of the Wildlife (conservation and Management) Amendment Act CAP 376, laws of Kenya (now repealed) for a 3 year term.

7. It is not in dispute that the plaintiff was recruited from the World meteorological Organization (WMO) in Geneva Switzerland where he was serving a 2 year extended term beginning 18<sup>th</sup> December 2002 until 17<sup>th</sup> December 2004.

8. The Permanent Secretary Ministry of Environment Natural Resources and Wildlife (Ministry) Rachel Arungah (PS) issued the claimant with a letter of appointment on 7<sup>th</sup> October 2003. The letter was followed by a further letter of appointment with terms and conditions of service written by the Chairman of KWS Mr. Colin Church and dated 9<sup>th</sup> December 2003.

9. In terms of the said letter, the claimant was to be paid a basic salary of Kshs 490,000, house allowance of Kshs 86,000 per month and any other terms stated therein.

10. It is not in dispute that the claimant was greatly dissatisfied with the remuneration offered to him by KWS and persistently pushed the Board through its chairman to review his remuneration in line with the higher salary and allowance he enjoyed in Geneva and on the basis that he had been promised equivalent remuneration on his new appointment in Kenya.

11. On 26<sup>th</sup> January 2004, the PS Rachel Arungah wrote to the claimant firstly acknowledging a letter dated 22<sup>nd</sup> December 2003 written by Mr. Colin Church forwarding recommendations of the Board of Trustees on the proposed new remuneration of KWS Director.

12. Meanwhile, the PS stated that the Director shall continue to be remunerated at the levels enjoyed by previous holders of the office.

13. Pursuant to this letter by the PS, Mr. Collin Church wrote to the claimant on 11<sup>th</sup> December 2004 varying the claimant's salary from Kshs 490,000 to Kshs 592,900 per month. Mr. Collin stated in the letter "*This is similar to the last salary last paid to Dr. Leakey as per the attached payslip.*"

14. It is also not in dispute that the Chairman Mr. Collins Church wrote to the claimant on 29<sup>th</sup> January 2004 in which he stated inter alia "*I am aware that the office of the President is yet to finalize on your salary and terms of service upon taking over the Directorship of Kenya Wildlife Service. I am further aware that, your previous employer met school fees for your university children. While awaiting the Government decision on your terms, I hereby authorize payments of USD 23,000 and STP 10,000 to meet University expenses for your children. The recovery arrangement will be discussed later.*"

15. Not in dispute also is the fact that the Board of trustees was actually aware that the claimant was underpaid as compared to the salary he earned in Geneva and that he had been promised review of salary to meet his demands before taking up the new appointment.

16. The minutes of the Board meeting dated 18<sup>th</sup> December 2003 produced by KWS capture the issue as follows:

***“It was noted that the terms of service for KWS Directors had not changed in the last 5 years, and were possibly no longer competitive. It was further noted that Mr. Mukolwe had been earning a higher salary in his previous employment”.***

The claimant had been excused from attending this board meeting since it was to discuss his remuneration.

17. The board further stated on the Director’s remuneration;

***“It was agreed that the proposal shall define the standard salary package for any KWS Director and in the event that this was lower than the salary enjoyed by Mr. Mukolwe in his previous employment, then the Board can recommend a ‘personal -to-self’ salary package”.***

18. In a subsequent meeting of the Board held on 3<sup>rd</sup> February 2004 according to minutes, again produced by KWS the Board of Trustees stated as follows:

***“The Board and Management has been unable to finalize issues like KWS corporate Structure, the Directors remuneration and appointment of Honorary Wardens because the requisite approval had not been received from the relevant ministry”.***

19. The Board noted that as a result of these delays *“the integrity of the Board was threatened by such delays”.*

20. KWS, the 2<sup>nd</sup> respondent, did not produce minutes of any other subsequent meetings by the board of Trustees despite insistence by the claimant that such minutes existed and were in the custody of KWS.

21. It is also not in dispute two controversial letters dated 24<sup>th</sup> June 2004 and 8<sup>th</sup> July 2004, purportedly written by Mr. Colin Church to the claimant in which the terms and conditions of service of the claimant were reviewed and implemented were produced before court by the claimant.

22. The claimant testified that the Board through its chairman following his persistent demand for the review of his terms increased his basic salary to Kshs 950,000 per month; House Allowance to Kshs 100,000 per month; two service vehicles for official use; A maximum of Kshs 100,000 club membership fees per annum; Reimbursable entertainment allowance of Kshs 100,000 per month; 30 days Annual Leave; Kshs 40,000 Leave allowance per annum; Gratuity calculated at the rate of 20% of the basic salary; Medical cover to self and family; School fees at the rate of Kshs 200,000 per annum per child for a maximum of four (4) children up to the age of 21 years or full graduation; Kshs. 20,000 transport allowance per month; ranger security for residence and home; Kshs 20,000 Utility allowance per month to cover home telephone, electricity and water expenses; Uniforms; Gardener and cook at the residence. Three (3) months termination notice or payment of three months salary in lieu of notice.

23. The said letter of 24<sup>th</sup> June 2004, was said to ***“supersede all other previous correspondence on the appointment”.***

24. The authenticity of the letter and the terms contained in the letter of 24<sup>th</sup> June 2004 is denied by KWS and Mr. Collins Church. Equally the forwarding letter dated 8<sup>th</sup> July 2004 is denied by KWS and Mr. Collin church denies its authenticity. This led us to the issues in dispute in this matter.

### **Issues in Dispute**

25. The gravamen of the dispute in this suit is the authenticity of the letter dated 24<sup>th</sup> June 2004; the forwarding letter dated 8<sup>th</sup> July 2004 and the terms and conditions of service for the claimant contained in the letter dated 24<sup>th</sup> June 2004.

26. It is not in dispute that the terms contained in the letter of 24<sup>th</sup> June 2004 were implemented and backdated to the date of appointment of the claimant. The claimant was paid arrear salary and allowance as provided in this document up to and until the 30<sup>th</sup> October 2004 before he was suspended on 12<sup>th</sup> November 2004 by the PS, Ministry of Tourism and Wildlife, Mrs. Rebecca Nebutola.

27. The PS in response to queries by the claimant on his predicament following that suspension and non-payment of November 2004 salary wrote to the claimant on 17<sup>th</sup> December 2004 restating that the claimant was under suspension from 17<sup>th</sup> November 2004 without any pay as per the *public service commission Act, Cap 185 Ref. 24(3) which states*

***“While a public officer is suspended from the exercise of the functions of his public office under this regulation, he shall not be entitled to any salary”***

28. The claimant was further directed to hand over all matters pertaining to the position of Director KWS to Amos Mukuriech who had been seconded to KWS as Ag. Director.

29. It is not in dispute that the claimant previously held the position of Director Coordinator for Scientific and Technical Programmes in the WMO Secretariat in Geneva. What is in dispute is whether his appointment in Kenya, disentitled him completely to any equivalent remuneration and other terms and conditions of service that he had enjoyed in Geneva.

30. Further, an issue for determination, which is in dispute is whether Government was estopped from denying the claimant equivalent terms as those the claimant enjoyed in Geneva and if this court has jurisdiction to pronounce itself whatsoever on matters that solely happened in Geneva, Switzerland and not in Kenya.

31. The counterclaim by the 2<sup>nd</sup> respondent is opposed in its entirety and same comprise, what the 2<sup>nd</sup> respondent considers to be overpayment of salary and allowances pursuant to the purported salary increment on 24<sup>th</sup> June 2004 in the sum of Kshs 7,068,830; salary advances in the sum of Kshs 2,500,000; unauthorized medical bills in the sum of Kshs 732,929; unauthorized purchase of carpets and curtains in the sum of Kshs. 662,300; refund of electricity bill payment Kshs 136,137 and house rent paid for the claimant in the sum of Kshs 75,000 all totaling Kshs. 11,175,196 less exgratia terminal dues not yet paid Kshs (1,568,000) Net counterclaim Kshs 9,607,196.

32. Accordingly, though the issues in dispute are broad, the determination of all these issues hinges on the determination of the following narrower issues:

(i) Whether the letter containing terms and conditions of service of the claimant dated 24<sup>th</sup> June 2004 is authentic and therefore entitles the claimant to the remuneration and terms and conditions of service contained therein.

(ii) Whether the claimant’s suspension and replacement from employment was for a valid reason and was done following a fair procedure.

(iii) Whether the counter claim made by the 2<sup>nd</sup> respondent against the claimant has merit and therefore payable by the claimant.

(iv) Whether the claimant is entitled to reinstatement and other reliefs set out in the memorandum of claims.

### **Determination**

33. Issues (i) and (ii) are intertwined and will be dealt with together.

34. The claimant has produced the letter dated 24<sup>th</sup> June 2004 detailing his terms and conditions of service and forwarded to him by the chairman of the Board of Trustees Mr. Collins Church, by a letter dated 8<sup>th</sup> July 2004 as the basis of all the contested payments made to him by KWS with effect from 24<sup>th</sup> June 2004 up to 30<sup>th</sup> October 2004. The 2<sup>nd</sup> respondent has contested the authenticity of this letter stating that the signatures of Mr. Collins church were forged and KWS did not accord the claimant at all the revised terms and conditions of service contained in the said letter which terms were implemented by the Human Resource Office of KWS from 24<sup>th</sup> June 2004 to 30<sup>th</sup> October 2004.

35. The 2<sup>nd</sup> respondent states that the claimant falsely granted himself these terms and abused his office to cause the said payments to be made to him by his subordinates he being the Managing Director of KWS.

36. The claimant testified at length on the events leading to the improvement of his terms of service and states that he did not abuse his office; that the new terms were granted to him properly by the Board of Trustees and communicated to him by the chairman. That if the terms were not genuine, there is no way the Human Resource office would have implemented the same.

37. The claimant states that the denial and purported retraction of his terms of service by the chairman was an afterthought following the claimant's suspension by the ministry and that false criminal charges were crafted against him to pre-empt his claim against KWS. That the claimant was vindicated by the acquittal by the High Court on the contrapted charges following an erroneous conviction by the magistrate court.

38. The claimant denies that he owes the respondents any money except the balance of salary advance given to him and authorized by the Board to ease his situation pending finalization of the terms and conditions of his service. The claimant states that his suspension was irregular, unlawful, and unfair in that the PS had no authority to suspend him from office he being a presidential appointee and he insisted that he had not been properly removed from office as Director KWS and was still the legitimate holder of that office notwithstanding purported replacement by other persons to date. The claimant prays that he be granted all the reliefs sought including reinstatement as Director KWS without loss of benefits to the date he would lawfully vacate office since the 3 year contract was renewable upon expiry.

39. The 2<sup>nd</sup> respondent called four (4) witnesses to testify in defence of the claim against the respondents by the claimant:

Elizabeth Njeri Mwangi told the court that she was the acting Human Resource, Training and Development Manager of the 2<sup>nd</sup> respondent. That the claimant was appointed Director of KWS on 2<sup>nd</sup> October 2003 and was gazetted vide Gazette Notice Number 7091 on 3<sup>rd</sup> October 2003. That claimant was given a letter of appointment with terms and conditions of service dated 9<sup>th</sup> December 2003. That his basic salary was Kshs 490,000 and house allowance of Kshs 86,000 per month. The letter was signed by chairman of Board of Trustees Mr. Collins Church. That according to the letter, these were **interim** terms and conditions of service and the letter said substantive package would be proposed by the Board of Trustees through the PS Ministry of Environment, National Resources and wildlife to be considered by the state corporation's Advisory Committee.

40. That on 11<sup>th</sup> February 2004 Mr. Collins Church wrote to the claimant informing him that his salary had been raised from Kshs 490,000 to Kshs 590,000 per month being salary last paid to the previous Director. The said terms and conditions did not provide for a medical cover and furnishing of his house.

41. That later on she received a letter dated 24<sup>th</sup> June 2004 pegging the salary of the claimant at Kshs 950,000 per month and house allowance of Kshs 100,000 per month together with other emoluments stated in the letter. That these terms were backdated to the date of the claimant's appointment.

42. That the arrear payments were processed through finance office and paid. That the claimant then left the organization and Human Resource department got information that the terms contained in the letter of 24<sup>th</sup> June 2004 had not been approved by the relevant governmental agencies.

43. That the claimant had also requested for salary advance which the department had processed and paid and all the details of the payments are with finance department.

44. That the tenure of the claimant as Director ceased upon appointment of Mr. Julius Kipng'etich as the new Director KWS before the employment of the claimant by KWS ended on 21<sup>st</sup> December 2004 going by the corrected Gazette Notice No. 10336 of 2004 dated 28<sup>th</sup> December 2012.

45. That according to her the claimant should refund all payments made to him over and above his official salary, the salary advance and refund the costs of furnishings and carpets. The witness was subjected to very close cross-examination by counsel Guserwa for the claimant. The bottom line of her evidence is that they did not doubt the authenticity of the letter by Collins church giving new terms of service to the claimant dated 24<sup>th</sup> June 2004. That they obeyed the letter fully and no one questioned the monthly payments made to the claimant until he stopped working for the 2<sup>nd</sup> respondent as Director KWS.

46. The Acting Head of Finance of the 2<sup>nd</sup> Respondent Mr. Jairus Sokoro also testified in this matter. He said that his substantive

post was Senior Accountant in-charge of payments in the year 2004. That in his department they processed all payments of the organization including payments to the claimant. That they paid the claimant different sets of salaries beginning with Kshs 490,000 per month, Kshs 592,900 and Kshs 950,000 per month in accordance with advice received from the Human Resource Department. That in terms of government regulations, the claimant was the accounting officer of KWS and was responsible for the funds of KWS. That a report was made to the inspector of state corporations on allegations of mismanagement of KWS.

47. That in March 2004, the inspector of state corporations sent a special audit team to KWS to look into the management and finances data. That the claimant called all heads of departments and informed them to cooperate with the audit team and provide all the necessary information required. That the witness provided documents relating to Hotel expenses incurred at Norfolk Hotel by the claimant. This is where the claimant was housed in the interim upon his return to Kenya from Geneva. Documents relating to a lease of a house occupied by the claimant and payments for furnishing purchased for the claimant's residential house. The inspectorate prepared a report and same were forwarded to the ministry.

48. The witness further testified that the claimant had requested for salary advance of Kshs 3,300,000 which was given to him and a sum of Kshs 800,000 was recovered leaving a balance of Kshs 2,500,000 which amount was still owing.

49. That from July 2004, upon receiving instructions from Human Resource department, the claimant was paid Kshs 950,000 and house allowance of Kshs 100,000 per month plus other dues based on new terms and conditions of service. That the finance department processed arrear salary and allowance difference and paid the same from the date of the claimant's appointment.

50. That on 8<sup>th</sup> November 2004, the claimant was suspended from work. That the department was informed that all payments made from July 2004, were irregular and had not been authorized by relevant state agencies. The department then worked out the over payments and made a debit for refund in KWS books. That the claimant was charged in court but he was acquitted. That the claimant ceased to be an employee of KWS on 21<sup>st</sup> December 2004 when Mr. Julius Kipng'etich was appointed as a Substantive Director.

51. The witness was also cross examined extensively by counsel Guserwa for the claimant and he insisted that the finance department had no way of knowing that the payments for the claimant were irregular until the department was informed so much later.

52. The 2<sup>nd</sup> respondent also called Mr. Collins Church, the Chairman of KWS at the time who testified that the claimant was appointed by the president. That the Board of Trustees did not play a role in the appointment. That the claimant earned an initial salary of Kshs 490,000 and house allowance of Kshs 86,000 but was dissatisfied with his salary. The Board of Trustees promised the claimant that his salary would be reviewed.

53. That on 11<sup>th</sup> February 2004, Mr. Collins wrote to the claimant on behalf of the Board of Trustees and increased his salary to Kshs 592,900 and house allowance of Kshs. 100,000. That the issue of claimants' salary was only discussed in two Board meetings, on 2<sup>nd</sup> November 2003 and 18<sup>th</sup> December 2003.

54. That on 18<sup>th</sup> December 2003, a Board paper containing proposals of the Directors remuneration was discussed. It was agreed that the Board's proposal would be forwarded to the parent ministry. That the next Board meeting of 2<sup>nd</sup> February 2004 noted the delay in concluding the issue of claimant's salary. That the issue was not discussed in any other Board meeting chaired by Mr. Collins Church.

55. That Mr. Collins received a memo prepared by one Leresian Lesiyambe dated 6<sup>th</sup> July 2004 on comparable salary paid to CEO's of State Corporations.

56. Mr. Collins denied that he authored the letters dated 24<sup>th</sup> June 2004 and 8<sup>th</sup> July 2004, allegedly raising the salary and introducing other terms and conditions of service for the claimant. Mr. Collins said his signatures were forged in the two letters. Mr. Collins insisted that the Board had yet to receive ministerial recommendations so as to finally review the claimant's salary.

57. Under cross examination, Mr. Collin said he did not participate in the criminal case against the claimant. It was put to him that the signatures in the two letters were never challenged in those cases. It was also put to him that the salary of the claimant was paid

for several months on the basis of the said letter by Collins Church and nobody challenged the signature. It was further put to him that the Board never questioned the letters until the claimant was suspended for other reasons.

58. It was also put to him that the office of the president did not question the letter by Collins Church nor the payment of the salary.

59. It was put to Collins that the signature on the letter of 24<sup>th</sup> June 2004 was like all other of his signatures.

60. Mr. Collins insisted however that he did not authorize the letter nor increase the remuneration of the claimant.

61. Finally, Emmanuel Kenga, police document examiner testified to the effect that he had compared the signatures on the letters dated 24<sup>th</sup> June 2004 and 8<sup>th</sup> July 2004 and six sample signatures of Mr. Collins Church and had come to the conclusion that the two letters were not signed by Mr. Collins Church as the two signatures were different from the samples given by Mr. Collins Church. The witness stated that he had 26 years experience in document examination and had trained at the CID headquarters laboratory in Nairobi, National Police Headquarters, Laboratory in Jerusalem, Israel and Interpol Headquarters in Lyon France and Moshi in Tanzania. He said the questioned signatures marked "A1-A2" were compared with samples "C1-6". That he found no similarities on the signatures. The questioned signatures were written by a different author. That he subjected the questioned signatures and the standard signatures on a platform of a microscope and magnifying glasses for enlargement and good observation.

62. That the peculiar individual characteristics were based on style, pen lifts, pen speed, pen movement, alignment, pen pressure and he had also to consider the natural variations of the signatures.

63. The witness was closely questioned by counsel for the claimant to show the specific differences noted on the comparison chart because there were no marks indicating specific differences between the questioned signatures and the specimen signatures or known signatures at page 5 of the forensic report titled 'Comparison chart'. The witness denied that he was instructed to produce a report to support the version by counsel for the 1<sup>st</sup> respondent Mr. Lutta, his client. The witness further said, specimen signatures were done in his presence by Mr. Collins. That he got known signatures from Mr. Lutta. That the documents he got with questioned signatures were photocopies. That there was no original signatures. The witness further said that the signatures were clear. That the examination took place at his private office at Wilson Air-port and he used his personal equipment. He said that he worked for profit and his business was registered.

64. The witness insisted that the method he used is the known and accepted method of signature examination. He said that the accuracy of the examination was about 90%.

65. The witness however said nothing at all in the report on the defining differences between questioned signatures, specimen signatures and known signatures. The report simply says the questioned signatures differed with the sample signatures and known signatures without any explanation at all.

66. The claimant was not charged with any disciplinary offences upon his suspension. He was not given a notice to show cause nor was he subjected to a disciplinary hearing. The claimant was not given a letter of termination but remained in limbo until he was replaced by Mr. Kipng'etich. It was long after the constructive termination that the claimant's terminal benefits were processed but were not paid out to the claimant.

67. The claimant according to the 1<sup>st</sup> respondent was charged with the offence of failing to comply with guidelines relating to the incurring of expenditure contrary to *Section 45(2) (b) as read with Section 48(1) of the Anti-corruption and Economic Crimes Act*. The 1<sup>st</sup> respondent stated that the claimant was before the Chief Magistrate in Anti-corruption case NO. 5 of 2006. The claimant was convicted but was acquitted on Appeal to the High Court on 16<sup>th</sup> November 2010.

68. That the head of state revoked the claimant's appointment as Director by a notice dated 24<sup>th</sup> December 2004 while the Criminal case was ongoing and appointed Mr. Julius Kipng'etich on 24<sup>th</sup> December 2003.

69. That an error on the Gazette revoking the appointment notice No. 7092/03 was later corrected to revoke the correct notice No. 7091/03.

70. The 1<sup>st</sup> respondent states all the terminal dues of the claimant were paid. That proper procedure was followed.

71. The 1<sup>st</sup> respondent submitted that the claimant held office at the pleasure of the president in terms of *Section 25(1) of the repealed Constitution*.

72. That the claimant had no legitimate claim under the doctrine of legitimate expectation.

73. That under the *Applicable Employment Act Cap 226 of 1976*, then in place an employee whose employment was terminated was only entitled to payment in lieu of notice period and no award of damages was provided in the law then.

74. Accordingly, the 1<sup>st</sup> respondent denies any liability at all and states that the reliefs sought by the claimant have not been provided and they ought to be dismissed.

75. The 1<sup>st</sup> respondent further submitted that the issues in dispute were determined in Judicial Review Miscellaneous Civil Application NO. 375 of 2012 and No. 278 of 2011 and were both dismissed by the High Court. That the case is resjudicata and the claimant cannot have a second bite on the cherry. That for these reasons, the suit be dismissed in it's entirety.

76. That in any case, the acquittal of the claimant from criminal charges does not mean that the claimant was not guilty of disciplinary issues and should be reinstated. The 1<sup>st</sup> respondent relied on the case *of Kenya Power and Lighting Company Limited vs Aggrey Lukoulo Wasike [2017] eKLR* where the Court of Appeal held

***“The learned Judge herein took umbrella under the fact that Wasike was acquitted of the criminal charge. With respect, that was the wrong approach and perpetuated the criminal standard of proof .....*”**

77. In the case of *Jairum Mugeru Igati vs Public Service Commission of Kenya [2014] eKLR*, it was also held that there is nothing in the Public Service Commission Regulations which support the disciplinary process is tied to criminal process that may arise from the same facts.

78. The 1<sup>st</sup> respondent prays that the suit be dismissed in it's entirety.

79. It is important to note that the 2<sup>nd</sup> respondent did not call any witness from the parent ministry nor did we get any testimony from the Inspectorate of parastatals on the alleged investigations of irregularities in management of KWS. The claimant having been acquitted of charges levelled against him by the High Court and there being no disciplinary hearing that took place at all against the claimant at the workplace, there is absolutely no evidence before court regarding any valid reason that led to the suspension and replacement of the claimant as Director of KWS.

80. The real issue is whether the claimant was paid a salary of Kshs 950,000 and the allowance contained in the letter dated 24<sup>th</sup> June 2004 wrongfully and therefore an order of refund of the said salary ought to be granted as prayed in the counter claim.

81. A careful analysis of the evidence by the claimant vis a vis by that of defence witnesses RW1 to RW4 leads the court to the conclusion that the respondent paid the claimant a salary in terms of the letter dated 24<sup>th</sup> June 2004 and back dated his salary to the date of appointment on 3<sup>rd</sup> October 2003.

82. The Corporation continued to pay the said terms and conditions of service to the claimant on a monthly basis until the end of October 2004, a period of over one year without questioning the authenticity of the letter of 24<sup>th</sup> June 2004. The amounts paid to the claimant were substantial and there is no explanation by any member of the Board of Trustees who included the PS Ministry of Tourism and Wildlife as to how these payments would have been done without approval of the Board.

83. It is inconceivable that the Human Resource Department and the Finance Department manned by competent officers and represented by RW2 and RW3 in this court would have sanctioned such payments without knowledge internally that the Board of Trustees through the chairman had approved the payments.

84. It is significant to note that the claimant was never charged with forging his letter of appointment and fraudulently obtaining salary from KWS. It is more curious that the chairman of the Board Mr. Collins Church never filed a complaint with the police that the claimant had forged his signatures and had granted himself new terms and conditions of service fraudulently. It is telling that Mr. Collins Church was not involved at all in the investigations and the criminal proceedings conducted against the claimant. Clearly, the issue of the letter dated 24<sup>th</sup> June 2004 being a forgery is an afterthought and cannot be validly used to obtain from the claimant remuneration that had been granted him by the chairman of the Board of Directors Mr. Collins Church.

85. The forensic evidence by RW1 does not take the matter any further coming too late in the hour and on the face of an acquittal by the High Court of the Criminal charges on purported irregularities committed by the claimant in the cause of his duties as the Director of KWS.

86. The lack of marked and demonstrated difference on the face of the comparison chart between the questioned signatures, the specimen signatures and known signatures by the forensic expert made the forensic report of no or little probative value indeed, and in addition to the lack of specified and marked differences, there is no narrative at all in the forensic report on the noted differences between questioned signatures, specific signatures and known signatures based on the testing parameters well-articulated by RW1, the forensic expert in his oral testimony.

87. The court is satisfied that KWS varied the terms and conditions of the claimant vide the letter dated 24<sup>th</sup> June 2004, and the claimant has proved this fact on a balance of probabilities. The respondent has failed to rebut to the satisfaction of the court this credible evidence adduced by the claimant. It is inconceivable, that a high flier of the caliber of the claimant fresh from a very lucrative assignment in Geneva, sacrificed to honour a presidential appointment would bend that low, as to forge his own letter of appointment.

88. The Board records produced by KWS and the letters by KWS clearly show that KWS was keen to review the terms and conditions of service of the claimant, who they considered underpaid and the Board of Trustees did exactly that and the chairman communicated to the claimant on 8<sup>th</sup> July 2004 the new terms and conditions of service. Clearly KWS was frustrated by the delay by the Ministry to conclude the review of terms and conditions of service of KWS Director and the Board vide, its chairman took it upon itself to exactly do that.

89. It is the court's considered view that the claimant was an employee of KWS and it was the Board of Trustees that had the mandate to review his terms and conditions of service. The evasive conduct by the Board of Trustees and failure to produce any minutes of the Board for the period March 2004 to November 2004 is explained in the court's view by the heat generated by the investigations by the parent ministry, the Inspectorate and EACC that had commenced. The Board of Trustees in the court's view in the absence of any explanation from the Board itself is presumed to have taken to protecting itself and left the claimant to his own devices. Accordingly, the claimant's suit succeeds on the merits and the court finds that all remuneration introduced in the letter dated 24<sup>th</sup> June 2004 was properly and validly paid to the claimant and ought not to be refunded.

#### **Issue (iii) and (iv)**

90. Whether or not the claimant is entitled to the reliefs sought is intertwined with the issue whether the counter claim by the 2<sup>nd</sup> respondent has merit.

91. The court has found that the contract between the claimant and the 2<sup>nd</sup> respondent dated 24<sup>th</sup> June 2004 was valid. The claimant is therefore entitled to payment of the full remuneration stipulated in that document until the date he was removed from office and replaced by Dr. Julius Kipng'etich on 21<sup>st</sup> December 2004. The claimant was paid full remuneration in terms of the letter dated 24<sup>th</sup> June 2004 up to and including 30<sup>th</sup> October 2010.

92. The claimant is owed Arrear salary for the months of November and December 2004 at the rate of Kshs. 1,099,000 per month in the sum of Kshs 2,198,000.

#### **Notice Pay**

93. The claimant's employment was not terminated for a valid reason and the termination was not done in terms of a fair

procedure. The claimant was entitled to termination notice of three months or payment in lieu of 3 months notice. This was not accorded to the claimant. The court awards the claimant accordingly in the sum of Kshs. 3,297,000.

### **Gratuity**

94. In terms of the letter dated 24<sup>th</sup> June 2004, the claimant was entitled to gratuity calculated at 20% of the basic salary for the period served. The claimant had served from 3<sup>rd</sup> October 2003 up to 21<sup>st</sup> December 2004, a period of one year and 2 months i.e 14 months. In terms of the letter dated 24<sup>th</sup> June 2004, the claimant earned a basic salary of Kshs. 950,000 per month. The claimant is entitled to 20% of the salary earned for 14 months as follows is the sum of Kshs 2,660,000.

### **Reinstatement and damages**

95. The claimant seeks reinstatement without loss of remuneration from the date of purported termination till the date of reinstatement and or date of judgment and in the alternative payment of all lost remuneration for the unserved years until the date of expiry of three (3) years contract on 2<sup>nd</sup> October 2006. Accordingly the claimant seeks payment for the unserved 23 months period. The claimant testified that he had legitimate expectation upon being persuaded to leave the lucrative office in Geneva, and having taken a lesser paying job in Kenya he would in the least serve the full term of the first 3 years contract even though the same was renewable.

96. The claimant relied on the decision of *ELRC in Nairobi cause No. 1168 of 2012 Pravin Bowry vs Ethics and Anti-corruption Commission* in which the court awarded the claimant his salary and allowance for the unexpired period of contract based on the doctrine of legitimate expectation.

97. In Nairobi *ELRC Cause No. 842 of 2012 (formerly HCCC NO. 1187 of 2001, Ambassador Samson Kipkoech Chemoi vs Richard Enskine Leakey, the court held as follows:*

*“The claimant seeks to be paid a sum of Kshs. 101,708,529 being the equivalent of the claimant’s tax free salaries and benefits for the 22 months unexpired term of his contract between 15<sup>th</sup> November 1999 to 2<sup>nd</sup> August 2001.*

*As said earlier no person has a personal entitlement to be appointed a representative of the sovereign as an Ambassador or High Commissioner. However, once the appointment has been made by the sovereign and for a fixed term then the doctrine of legitimate expectation comes to play that the terms and conditions of the contract shall be fulfilled by either party.”*

98. If the contract itself provide for an exit clause and the same is terminated lawfully in terms of the said contract, then the employee is only entitled to payment equivalent to the notice period provided in the contract itself. *See the decision of the court of Appeal in United States International University vs Eric Rading Outa [2016] eKLR.* However, if the court finds that the contract of service was terminated unlawfully, as it was in the present case, then the employee is entitled to general damages.

99. This case is on the fours with the present case. The claimant was employed by the head of state on a three (3) years fixed term contract.

100. The claimant had legitimate expectation that the terms and conditions of the contract would be honoured to the end. However, the court has found that the contract was unlawfully and unfairly terminated on 21<sup>st</sup> December 2004 with the claimant yet to serve 22 months. The claimant has narrated the immense suffering he underwent following the unlawful suspension, degazettment and replacement for no reasons attached and without following a fair procedure. The claimant was charged before the anti-corruption court in Nairobi on allegation of irregular payments of funds. The claimant was convicted by the Magistrate court but was acquitted by the High Court on Appeal. The claimant was not subjected to any disciplinary hearing at the work place and during the pendency of the criminal trial he only had a letter of suspension and summary replacement vide gazette notice. The claimant had forfeited a high paying job in Geneva to take up the appointment as Director KWS. The claimant’s children were still studying in Europe and suffered great hardship due to inability to pay school fees. The claimant had been promised equivalent remuneration upon coming to Kenya from Geneva. He was taken in circles until 24<sup>th</sup> June 2004 when his remuneration was revised by the Board of Trustees and the chairman of the board communicated his new package to him. Still the claimant suffered the indignity of being branded a fraudster on allegations that the letter granting him the new package was a forgery and that he should refund all the

remuneration enjoyed by him for a period of over one year. The claimant was not paid any terminal benefits upon suspension and replacement on 21<sup>st</sup> December 2004.

101. It is now more than 14 years since the claimant lost his job. His wish to be reinstated is not practicable and therefore cannot be granted. KWS moved on and replaced the claimant on 21<sup>st</sup> December 2004. Several Directors of KWS have been appointed and left the organization since then.

102. The claimant has suffered great loss and damage as a result of the mistreatment he suffered at the hands of KWS and the parent ministry. Accordingly, this is an appropriate case to award the claimant damages equivalent to the unserved term of the fixed term contract based on the doctrine of legitimate expectation. The court awards the claimant Kshs [1,099,000x42] = 24,178,000.

It should be remembered that the employment Act, 2007 had not been enacted at the time the cause of action arose.

103. The award of damages in this case is purely based on the doctrine of legitimate expectation in common law where severe damage and loss has been occasioned and proved as a result of unlawful termination by the respondent.

#### **Counter claim.**

104. The court is satisfied by the evidence by RW2, RW3 and RW4, that the claimant was advanced Kshs 3,300,000 upon his request and a sum of Kshs 800,000 was recovered from him leaving a balance of Kshs 2,500,000. The court awards this amount accordingly against the claimant to the respondent.

#### **Purchase of carpets and curtains**

105. The court finds that the claimant was at all material times paid house allowance to get a private residence for himself while he served as Director KWS. The court finds therefore any amounts spent by KWS to furnish the claimant's residence was a reimbursable expense incurred by the claimant. The court finds that the claimant ought to refund Kshs 662,300 spent by KWS on his residence and awards the 2<sup>nd</sup> respondent accordingly.

#### **House Rent**

106. The court finds that the claimant earned house allowance throughout the period he served as Director KWS. The 2<sup>nd</sup> respondent has proved that it paid Kshs 75,000 towards the rental payment of claimant's residence. This expense was subject to recovery from the house allowance. The court awards the sum to the 2<sup>nd</sup> respondent against the claimant.

#### **Medical bills and Electricity Bills paid.**

107. The claimant had a medical cover and was paid utility allowance of Kshs 20,000 a month for the entire period he served. Any amount paid by KWS on his behalf was a reimbursable expense and the 2<sup>nd</sup> respondent is entitled to recover the amount paid in respect of electricity bills since the amount was paid in arrears after the issue of the letter dated 24<sup>th</sup> June 2004. However, the medical bills of Kshs 732, 929 were incurred by the claimant prior to the provision of a medical cover to him which facility was contained in the letter dated 24<sup>th</sup> June 2004. There is no way the cover would have been back dated to defray the already incurred medical bills by the claimant and his family. Accordingly, this item has not been proved by the 2<sup>nd</sup> respondent and is disallowed.

#### **Overpayment of salaries and allowances.**

108. Upon the finding by the court that the salaries and allowances paid to the claimant for a period of over one year were legitimately paid, the claim by the 2<sup>nd</sup> respondent for refund of salaries and allowances paid to the claimant has no basis and is dismissed.

109. Accordingly, the court awards the counter claim to the 2<sup>nd</sup> respondent as against the claimant as follows:

- a) Kshs 2,500,000 salary advance
- b) Kshs 662,300 for purchase of carpets and curtains.
- c) Kshs. 136,137 for electricity bills paid and
- d) Kshs. 75,000 for rent paid. Total award to the 2<sup>nd</sup> respondent – Kshs 3,373,437.

The said sum is to be offset against the award made to the claimant.

110. In the final analysis the court enters judgment in favour of the claimant as against the respondents as follows:

- a) Kshs. 24,178,000 in damages
- b) Three (3) months salary in lieu of notice Kshs. 3,264,000.
- c) Gratuity for served term at 20% Kshs 2,660,000.
- d) Two months Arrear Salary – Kshs 2,198,000

Total award – Kshs. 32,300,000 less counter claim (3,373,437)

Net award Kshs 28,926,563.

- e) Interest on (a) above at court rates from date of judgment and from date of filing suit in respect of (b) (c) and (d) above.
- f) Respondent to pay half ( $\frac{1}{2}$ ) the costs of the suit.

**Judgment Dated, Signed and delivered this 7<sup>th</sup> day of March, 2019**

**Mathews N. Nduma**

**Judge**

**Appearances**

M/S Guserwa for the Claimant

Mr. Lutta for 2<sup>nd</sup> Respondent

M/S Akino for the 1<sup>st</sup> Respondent

Chrispo – Court Clerk



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