REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Ibrahim, Ojwang, Wanjala, Njoki & Lenaola, SCJJ)

PETITION NO. 12 OF 2019

-BETWEEN-

1. DR. SAMSON GWER

2. DR. MICHAEL MWANIKI

3. DR. NAHASHON THUO

4. DR. JOHN WANGAI

5. DR. MOSES NDIRITU

6. DR. ALBERT KOMBA.....APPELLANTS

-AND-

1. KENYA MEDICAL RESEARCH INSTITUTE

2. MINISTRY OF PUBLIC HEALTH & SANITATION

3. THE HON. THE ATTORNEY-GENERAL

4. UNION OF NATIONAL RESEARCH & ALLIED

INSTITUTES STAFF OF KENYA.....RESPONDENTS

(Being an appeal from the Judgment of the Court of Appeal (Makhandia, Kiage & Murgor, JJA), dated 9 November 2018)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] This is an appeal from the Judgment of the Court of Appeal, dated 9 November 2018, by which the Judgment and Decree of the Employment and Labour Relations Court dated 18 July 2019 had been set aside. The trial Court had found that the petitioners had suffered discrimination in their employment, at the hands of 1st respondent, and had awarded each petitioner 5 million Shillings. The petition is dated 19 March 2019, and is premised on Article 163 (4) (a) of the Constitution.

B. BACKGROUND

[2] The petitioners had been employees of the 1st respondent under various contracts renewed and extended from time to time, over a period of several years. They had also been attached to the KEMRI-Wellcome Trust Research Programme, hosted by 1st respondent, as clinical researchers, and were pursuing post-graduate studies leading to the award of the degree of Doctor of Philosophy, in their fields of research. The said programme belonged to Oxford University in England, and was operated through the Nuffield Department of Medicine, as one of its global health centres, founded by the Wellcome Trust.

[3] The 2nd and 3rd respondents have been taking a passive posture, and have not participated in this appeal. The 4th respondent was enjoined as an interested party, in its capacity as a trade union, during the trial proceedings, and it has consistently supported the petitioners' case.

[4] Before the trial Court, the petitioners alleged contravention of Articles 3, 10, 27, 28, 40, 41 73(1) (a), 156 of the Constitution by their employer, Kenya Medical Research Institute (KEMRI). They contended, *inter alia*, that their contracts under the programme, which was later subsumed under KEMRI (1st respondent), allowed discrimination against them, and treated them unequally, on account of their race, in various respects, including in the award of Wellcome Trust Research grants, which were skewed in favour of European Economic Area residents and "white expatriates", at the expense of "equally or more qualified local blacks"; that there was prejudice and condescension towards local African workers, as well as lack of commitment to racial equality; that there was a violation of their right to fair labour practices, contrary to the terms of Article 41 (1) of the Constitution ¾ in particular by way of their extremely short multi-contracts; that there was a violation of rules of natural justice, through unfair dismissal without a hearing and without reasons; that there was conflict in the setting of contracting authority, with contracts from both KEMRI and the Programme, leading to an unclear chain of command; that there were differential gratuity and staff guidelines between the two entities, and a curtailing of the doctors' right to join a trade union of their choice; that there was an unfavourable working environment, leading to or involving career stagnation for doctors; that there was interference with their training opportunities, and with their access to clinical funds; that they were victimized through suspension, for raising these grievances; that they were subjected to improper, indefinite leave, and were victimised by violation of Article 40 of the Constitution, regarding their right to intellectual property; and that they were subjected to loss of dignity, in violation of Articles 28, 29 and 30 of the Constitution.

[5] The Employment and Labour Relations Court *(Nduma, J)*, in a Judgment delivered on 18 July 2014, allowed the petition, holding as follows:

(a) That, the 1st respondent's conduct amounts to discrimination against the petitioners, under Article 27 (4) of the Constitution.

(b) That the 1st respondent's conduct, acts and/or omissions are unlawful, illegal and/or unfair, and the same violate Articles 27 (1), 28, 29 (d) & (f), 35 (1) (b), 40 91) and 41 91) & (2) of the Constitution.

(c) That each of the petitioners is entitled to compensation for the said violations under Article 23 of the Constitution, in the sum of Kshs. 5 million within thirty (30) days of the Judgment.

(d) That the petitioners are entitled to access all the outcomes of their scientific research, and to the credit and benefit attached to the said outcomes, under Articles 35 and 40 of the Constitution.

(e) That each of the petitioners is entitled to a certificate of service, acknowledging the service and scientific outcomes attributed to their research and work within 30 days from the date of the Judgment.

(f) The 1st respondent to pay interest at Court rates on item (c) above, as from the date of this Judgment, in full.

(g) *The 1st respondent to pay costs of the petition.*

[6] Aggrieved by the trial Court's Judgment, the 1st respondent appealed to the Court of Appeal, which allowed the appeal in a Judgment dated 8 February 2019, and set aside the Judgment and Decree, in the following terms:

(a) The trial Judge misdirected himself in certain factual or legal matters; considered matters he ought not to have considered; failed to consider matters he ought to have considered and, therefore, arrived at an erroneous decision; and he was clearly wrong in the exercise of discretion.

(b) The trial Court should not have decided the case on the basis of affidavit evidence, as more light and more accurate picture would have been attained, had it proceeded by way of ***viva voce*** *evidence.*

(c) The replying affidavit of Margaret Rigiro, with its annexures, which was 210-page, substantive, detailed response to the petitioners' case, is not referred to or mentioned in the Judgment; and similarly overlooked was her "Further Supplementary Affidavit", sworn on 30 October 2012, indicating that KEMRI paid the doctors all contractually-agreed remuneration, including that for periods when they did not work.

(d) The omission (stated above) occasioned a patent injustice, and was the mark of an unfair trial.

(e) the trial Court was wrong in finding that the 1st respondent violated Article 35 (1) (b) of the Constitution, as the same was not pleaded by the petitioners.

(f) Had the Judge evaluated the replying affidavit of Magaret Rigiro, he would have found that KEMRI did not directly employ foreign researchers, and those visiting retained their career structures and terms of employment from their home institutes and universities, over which KEMRI had no control; the programme had trained more than a score of senior legal researchers; KEMRI had in place an extremely well-funded remuneration structure that was competitive, and superior to that which the doctors' peers were paid, in the public sector or elsewhere, and any differential with what the expatriates were paid was on the basis of their different contracts with third parties, to which KEMRI was not privy; KEMRI offered benefits to doctors not expressly stipulated in their contracts, but which were similar to those it offered to all employees of similar positions, at great cost to itself.

(g) The doctors did not discharge their burden of proving that any differentials in pay were unreasonable, unaccountable, or discriminatory.

(h) It is not the case that any differential treatment is, ***ipso facto,*** *discriminatory; for a differentiation of treatment to be unconstitutional and impermissible, it has to be based on any of the prohibited grounds under Article 27 of the Constitution.*

(i) The trial Judge failed to pay heed to the provisions of Section 32 (1) of the Industrial Property Act, which provides that the right to a patent for an invention in the course of execution of an employment contract, shall belong to the employer. The Judge was under duty to inquire if there was a basis for departing from this general rule.

(j) There was no basis for the award of damages made by the trial Court.

C. THE SUPREME COURT CASE

(a) The Parties' Standpoints

[7] The petitioners, being dissatisfied with the Judgment of the Court of Appeal, filed a petition of appeal dated 19 March 2019. The petition is made pursuant to Article 163 (4) (a) of the Constitution " "as of right". It invokes Articles 24, 27 and 40 of the Constitution; Sections 15(2), 20, 21 and 22 of the Supreme Court Act; Practice Directions A (1) (2) (3) (4) (5)(6) and (7) and E (28) (29) (30); Rule 33(1) (2) (3) (4) (5) (6) and (7) ¾ under the Supreme Court Rules. The petition of appeal is supported by the affidavit of Dr. Moses Ndiritu, the 5th appellant, and a further affidavit by Dr. Samson Gwer, the first appellant, filed on 16 August 2019.

[8] The appeal is based on the following grounds:

(a) equality and freedom from discrimination, under article 27 of the Constitution;

(b) onus of proof, in discrimination cases;

(c) right to property under Article 40 of the Constitution; and

(d) failure to determine a cross-appeal.

[9] The appeal sets out the following issues for determination:

(a) what amounts to “indirect discrimination”, and whether or not discrimination under Article 27 of the Constitution encompasses institutional discrimination, as a form of indirect discrimination"

(b) whether or not a particular failure to make institutional anti-discrimination policies under Article 5(2) of the Employment Act amounts to an indirect discrimination under Article 27 of the Constitution"

(c) who has the onus of proof in discrimination cases under Article 24 of the Constitution, and Section 5(2) of the Employment Act"

(d) whether or not the onus of proving discrimination rests with the person claiming to be a victim of discrimination"

(e) whether or not the Judges of the Court of Appeal misinterpreted the provisions of Article 27 of the Constitution, as read with Article 24, and Section 5(2) of the Employment Act"

(f) whether or not the onus of proving discrimination shifts from the alleged victims to the culprit, under Article 24 of the Constitution"

(g) what amounts to a *prima facie* case, in the case of discrimination; and whether or not the learned Judges of the Court of Appeal misinterpreted the law, in assessing what would amount to a *prima facie* case of discrimination"

(h) the Court is invited to interpret whether the right to intellectual property under Article 40 of the Constitution, in relation to innovations made when an employee is not in employment, belongs to the employer under Section 13(2) of the Industrial Property Act or not.

(i) whether or not the Judges of the Court of Appeal misdirected themselves, in finding that the intellectual property statute is applicable even when the employer-employee relationship is suspended and/or severed, under Article 40(1) of the Constitution"

(j) whether or not the failure of the Court of Appeal to determine a cross-appeal offends Article 27(1) of the Constitution"

(k) what are the parameters of discretion, in re-analyzing a case after the Judges sitting on appeal point out that a case was fit for *viva voce* hearing"

[10] The appeal seeks the following reliefs:

(a) interpretation of what amounts to indirect discrimination;

(b) declaration that discrimination, under Article 27 of the Constitution, includes “institutional discrimination”;

(c) interpretation, and a declaration that the onus of proving discrimination under Article 27 of the Constitution, shifts from the victim to the culprit, once there is a *prima facie* case of discrimination under Article 24 of the Constitution, and Section 5(2) of the Employment Act;

(d) interpretation, and a declaration that the onus of proving discrimination lies on the respondent, ultimately under Article 24 of the Constitution, and under Section 5(2) of the Employment Act;

(e) declaration that the Judges of Appeal erred in law, in placing the burden of proof on the victims, and thereby, allowing the appeal;

(f) interpretation, and a declaration, that the right to intellectual property under Article 40 of the Constitution, and to innovations made when an employee is not in employment, belong to the employee, under Section 13(2) of the Intellectual Property Act;

(g) interpretation and Order to the effect that, failure to determine a cross- petition offends Article 27(1) of the Constitution;

(h) Order, setting aside the Judgment of the Court of Appeal, and allowing the petition;

(i) any other Orders or directions such as Court deems fit;

(j) costs of this petition, against 1st respondent.

(b) Submissions of Counsel

[11] The advocates for the petitioners, M/s. Chigiti & Chigiti Advocates, filed their written submissions dated 6 September 2019, in support of the petition of appeal, the same being highlighted on 15 October 2019. Learned counsel, Mr. Chigiti submitted that the critical question is, what amounts to "indirect discrimination"' He referred to a listing of his authorities on the definition of indirect discrimination, urging that such a form of discrimination is unique in type, and is difficult to prove. But he maintains that there was indirect discrimination, as viewed in relation to prohibited practices under Article 27 (1) of the Constitution, and under Section 5 of the Employment Act (No. 11 of 2007). It was submitted that, in awarding grants from the Wellcome Trust, African residents were excluded, most funding going to white expatriates, apart from the distribution of scientific positions being racially skewed, and controlled by such expatriates. In addition, it is submitted, there was no career progression for African workers; that there was a lack of equal pay for equal work; that there was a practice of condescension against local African workers; and that there was a lack of commitment to racial equality, there being no policy to ensure equality.

[12] The alleged practices by the 1st respondent were said to offend Section 5 (8) of the Employment Act, as they constituted institutional and/or structural racism. Counsel urged that this Court should draw inferences as to the reality of racial discrimination, by taking into account the resulting impacts of the same; the policies pursued by the 1st respondent; the practices of the 1st respondent; and the rules and regulations guiding the 1st respondent

[13] The petitioners have cited ***Zarb Adami v. Malta,*** Application No. 16631/04 (paragraph 80), in which the Court held that discrimination is not always direct or explicit, and that in certain cases, a policy, or general measure, will have prejudicial effects on a group of people, even if it is not directed at a particular group. They have also relied on the UN Committee on the Elimination of Racial Discrimination, in its General Recommendation XIV (at page 1), where racial discrimination was defined as extending "beyond measures which are explicitly discriminatory, to encompass measures which are not discriminatory at face value but are discriminatory in fact and effect". They have also relied on the Discrimination (Employment and Occupation) Convention of 1958, which defines the term discrimination in (Article 1) to include "such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation".

[14] The petitioners submitted that it is not necessary for them to prove that the impugned measure was designed or applied with any discriminatory intent. They call in aid the case of ***Ontario Human Rights Commission and Theresa O'Malley (Vincent) v. Simpsons - Sears Limited*** *[1958] 2 S.C.R 536,* which they urge to hold that proof of 'intent' was not important, because indirect discrimination is mainly concerned with the consequences of a conduct. They have also cited an Indian case, ***Madhu & Another v.***

Northern Railway & Others [2018], urging that the Judges had appreciated that the most important thing in indirect discrimination is the outcome, or the effects of the actions of the culprits, rather than the object of the relevant actions.

[15] It is the petitioners' submission that the Appellate Court had made no reference to the implications of indirect or institutional discrimination, such as emanated from lack of anti-discriminatory policies: even though institutional discrimination was substantively pleaded, and canvassed, by the petitioners in their submissions; that such was a narrow interpretation which failed to embrace the subtle forms of discrimination; and that the Appellate Court failed to make an interpretation of the concept of indirect discrimination.

[16] On indirect discrimination, the petitioners relied on the case of ***Queen, on the Application of Sarka Angel Walkins Singh v. the Governing Body of Aberdare Girls High School, and Another*** [2008] EWHC 1865, (paragraph 38), where *Justice Silber* considered the claimants' case on the grounds of indirect discrimination, prescribing several steps to guide the proof:

(a) to identify the relevant 'provision, criterion or purpose', which is applicable;

(b) to determine the issue of disparate impacts, which entails identifying a pool for the purpose of making a comparison of the relevant disadvantage;

(c) to ascertain whether the provision, criterion or practice also disadvantages the claimant personally; and

(d) to consider whether the policy is objectively justified by a legitimate aim; and to consider (if the above requirements are satisfied) whether this is a proportionate means of achieving such a legitimate aim.

[17] Learned counsel, Mr. Chigiti submitted that the employer might have no intention to practice discrimination: yet the outcome gives a different answer, in quality; and in this regard, the statistics, numbers, figures ¾ will help the Court to appreciate the inequality in the outcomes. The petitioners submit that the Appellate Court, while re-evaluating evidence, failed to draw its mind to the statistics which would have demonstrated a *prima facie* case. He urges that the statistics create a comparative platform where one is able to tell how many researchers are black, and how many are white.

[18] The petitioners' stand is that where the credibility of statistics has been positively assessed, their significance, trend and patterns need to be given legal effect, by a shifting of the burden of proof. It is urged that the weight of statistics will depend upon the extent of disadvantage that they reveal; and on this basis, statistical evidence is sufficient to establish a *prima facie* case of indirect discrimination. It is submitted that this Court should adopt the statistics-based approach, and acknowledge the emerging jurisprudence regarding the inherent difficulties in proving *indirect discrimination.*

[19] It is submitted that, once the petitioners have proved a *prima facie* case, the burden ought to have shifted to the 1st respondent, to prove that discrimination was no part of the situation occasioning grievance. The burden of proof, Mr. Chigiti submitted, ought to have shifted to the 1st respondent, especially as it is usually the employer who has the custody of records, of salaries, and of leave days of the employees. Counsel urged that the Appellate Court had misinterpreted the law, and failed to appreciate that the onus of proof, in discrimination cases, ultimately lies with the culprit, once the victim raises the issue of discrimination in the terms of Article 24 of the Constitution, and Section 5(2) of the Employment Act.

[20] Mr Chigiti submitted that the Court of Appeal erred, in believing the affidavit of the 1st respondent, which lacked statistics; in failing to address and analyse issues of leadership inequality, of fellowship, of lack of policies. He urges the Court to pay heed to the Concordat document attached to the petition, and which includes a bundle containing principles and values that regulate the Wellcome Trust, which funds KEMRI (1st respondent) in Kenya.

[21] The petitioners have invited this Court to consider whether the right to intellectual property, under Article 40 of the Constitution, in relation to innovations made when an employee is not in employment, belongs to the employer, under Section 13 (2) of the Intellectual Property Act. They submit that the Appellate Court had not paid attention to the fact that the 5th petitioner made some innovations while he was out of employment, during one of the several multiple contract-gaps. It is also submitted that the 1st respondent has on many occasions violated the petitioners' rights to property.

[22] The petitioners have invited this Court to adopt a liberal interpretation of the law, in relation to the concept of indirect discrimination, in line with Article 259 of the Constitution. They have urged this Court to adopt a purpose-oriented interpretation.

[23] This Court took into account the submissions of the 4th respondent, in support of the petitioners' case. The advocates for the 4th respondent, M/s. Enonda & Associates, filed written submissions dated 15 August 2019, these being highlighted by learned counsel Mr. Peter Enonda. These submissions highlight the point of contact between the 4th respondent and the petitioners, as well as 4th respondent's stand in favour of internal arbitral engagement, in the first place. The 4th respondent had also been involved when, following disagreement, the matter was reported to the Minister of Labour. The 4th respondent continued to be involved, as the matter came up before the Labour and Employment Court, and at the Appellate Court.

[24] The 4th respondent submits that the Court of Appeal ought to have made a determination on the cross-appeal, on the basis of the merits of each party's claim. Failure in this regard, counsel urged, amounted to an abdication of that Court's duty.

[25] The 4th respondent submits that the Appellate Court declined to take into account overwhelming evidence of discrimination, which was tendered by the petitioners, preferring to rely on the affidavit of the 1st respondent, and, consequently, arriving at a wrong conclusion. According to this respondent, the Appellate Court ought to have taken into account the abandoned mediation process, and a conciliator should have been appointed to determine the issues raised by the petitioners.

[26] The 4th respondent expressed disagreement with the argument by the 1st respondent, that it had no control over the contracts between its collaborators, on the one hand, and visiting foreign researchers, on the other hand: indeed, in that very argument, the 4th respondent conceives of such an improper control, on the party of 1st respondent, as did open doors to discrimination.

[27] The 4th respondent invited this Court to consider the matters from the Employment and Labour Relations Court, where damages were awarded for discrimination, as constitutional violations. This party made reference to several Court decisions: ***VMK v. CUEA*** (2013) eKLR (where the claimant was awarded Kshs.5 million); ***David Wanjau Muhoro v. Ol Pejeta Ranching Limited*** (2014) eKLR (where the Court awarded Kshs.18,256, 947); ***Mary Mwaki Masinde v. County Government of Vihiga & 2 Others*** (2015) eKLR (where the Court awarded Kshs.3 million); and ***Janine Buss v. Gems Cambridge International School Limited*** (2016) eKLR (where the Court awarded a sum of Kshs.6 million). On the basis of such Judgments, the 4th respondent urges that the relevant Superior Court had indeed had justification for its awards. The 4th respondent, therefore, urges this Court to allow the petition.

[28] The advocates for the 1st respondent, M/s. Muriu Mungai & Co. advocates, have filed their written submissions dated 10 September 2019, contesting the petition. They are also relying on their grounds of opposition dated 30 April 2019; and their replying affidavit sworn by Ms. Margaret Rigoro, filed on 14 June 2019. The 1st respondent is essentially rebutting the issues and allegations emanating from the petitioners. The submissions were highlighted by learned counsel, Mr. Peter Munge (on 15 October 2019), who proceeded from the threshold that the petitioners did have a contract with the 1st respondent, and while serving in that capacity, the petitioners were suspended, on account of their improper digital communications with third parties. Such suspensions were, however, subsequently lifted, on the basis of resolutions arrived at.

[29] Learned counsel submitted, as regards the claim of institutional discrimination, that the allegations are framed in a broad and general manner, without any nexus to the subject matter; and also that the petitioners are seeking to introduce fresh issues at the stage of second appeal. It was submitted that, no particulars of institutional discrimination had been pleaded at trial Court. It was submitted that Section 5(2) of the Employment Act, as cited by the petitioners, is framed in a general manner, yet it holds no place for the issues relating the 1st respondent, which had not been pleaded in the primary petition. Counsel urged, as regards intention to discriminate, that no particulars, or any evidence had been given, to prove some improper intent by the 1st respondent.

[30] Responding to the allegation by the petitioners, that there were no anti-discrimination policies at the Kenya Medical Research Institute (KEMRI), it is submitted that the 1st respondent had confirmed that there were policies in place at the material time: reference was made to the supplementary affidavit of Dr. Solomon Mpoke (Volume 17, page 4246 to volume 18, page 4401). In any event, learned counsel urges, failure to have a policy in place would not amount to an infringement of a constitutional right, as the law has clear remedies for such a state of affairs.

[31] As regards the allegation of distribution of scientific positions and career progression slots for those of African origin, the 1st respondent submits that the petitioners had not provided any particulars. Learned counsel submitted that the Court of Appeal cannot

be faulted for its finding on such allegations, as the 1st respondent had replied to all of them, by way of the replying affidavit by Margaret Rigoro, and the supplementary affidavit of Dr. Solomon Mpoke. Counsel submitted that even though 1st respondent did respond on all allegations raised by the petitioners, the trial Court's Judgment did not consider any of the affirmations thus made. The responding affidavits, it was submitted, gave details of those local researchers who held senior positions in the 1st respondent's Wellcome Trust Research Programme; gave details of local researchers who had been awarded funding through the 1st respondent's Wellcome Trust Research Programme; rebutted the allegations of differential pay; and explained that foreign researchers working under the 1st respondent's auspices, are seconded to Kenya under contracts with their respective employers , and not with KEMRI.

[32] On the issue of onus of proof in discrimination cases, the 1st respondent submits that its standpoint on pertinent law, though detailed, had not been accommodated in the trial-Court record. Supporting the Appellate Court on its interpretation of the provisions of Article 27 of the Constitution, the 1st respondent submits that the petitioners had presented no material before the trial Court, to warrant a finding of infringement of the Constitution. It was submitted, furthermore, that the petitioners had not provided any justification for the alleged differential of treatment, to be treated as unconstitutional.

[33] In response to the claim of violation of the right to property, the 1st respondent submits that the issue was not part of the pleadings in the petition before the trial Court, and the petitioner cannot introduce a new issue at this stage. It is also submitted that the Appellate Court cannot be faulted in its finding, as contracts between the institute and the petitioners expressly address the innovation theme bearing upon invention clause 13 of the employment contract, specifying that:

"Any intellectual property including patents, copyrights etc which arises in the performance of the duties of the person engaged shall belong to the Institute".

[34] Learned counsel submitted that the Court of Appeal had duly appreciated the statutory provision, wherein Section 32 (1) of the Industrial Property Act provides that, in the absence of contractual provisions to the contrary, the right to a patent for an invention made in execution of a commission or an employment contract, shall belong to the person having commissioned the work, or to the employer. Counsel submits that, at the material time, the petitioners were working as employees of KEMRI, and also, as Ph.D. students, being supported by the Institute, and were working under experienced mentors or researchers in the relevant field, and in the development of other research areas. As such, it is submitted, what is being done was in relation to the petitioners' capacity as employees of KEMRI, and there was no evidence to the contrary. Learned counsel submitted, further, that the petitioners had not cited any innovation, in any case, to which their grievance related.

[35] On the issue of compensation, learned counsel invited the Court to consider Section 19(1)(c) of the Employment Act, especially in relation to the consistent action of the employer, in continuing with regular payment to the petitioners, who had refused to work for close to one year. He submitted that the Court should have considered the terms of Section 45 of the Employment Act, before awarding Kshs.5 million to each of the petitioners. He urged that there was no basis in law under which the Court had awarded the said sums in damages.

[36] In response to the contention by the 4th respondent, that the 1st respondent declined to abide by the report of the conciliator, learned counsel urged that the decision by the conciliator was not binding; for, once a conciliator makes recommendations, and a party does not comply, the other party has a right to move to Court. Learned counsel expressed his dissatisfaction with the said report, stating that it was untenable for the recommendation by the conciliator to direct a reinstatement of parties who had been requested to come back and had refused.

[37] On the allegation that the Court of Appeal did not consider the cross-appeal by the petitioners, it is submitted that the findings of that Court, in respect of the main appeal, sufficiently addressed the issues pleaded in the cross-appeal; and, with the collapse of the main appeal, the cross-appeal also failed, because the relevant issues were interrelated.

[38] Learned counsel submitted that although the 2nd and 3rd respondents were named in the petition before the trial Court, no allegations were made against them. He submitted that this was a private dispute between an employer and employees; he attributed fault to the trial Court for delivering a Judgment in which it found all the respondents jointly and severally liable. The 1st respondent urges this Court to dismiss the petition with costs.

D. ANALYSIS AND DETERMINATION

[39] We have attentively considered all submissions from the parties, as well as their depositions and lists of authorities. Due credit goes to learned counsel, who have generously supplied the Court with informative records and works on novel aspects of the intriguing subject of “indirect discrimination”.

[40] In our considered view, the following are issues for determination:

(a) whether discrimination in the course of employment had characterized the operations of the 1st respondent"

(b) who has the onus of proof in discrimination cases"

(c) were the petitioners’ rights to intellectual property violated by the 1st respondent"

(d) what was the effect of the non-determination of a cross-appeal by the Appellate Court"

[41] It is the petitioners’ contention that the 1st respondent had subjected them to discrimination in employment. They aver that there was discrimination in the dispensation of international jobs; in awarding grants from the Wellcome Trust; in the distribution of scientific positions with access to funding, to career-progression for African workers, and to equal pay for equal work; lack of commitment to racial equality, as well as a lack of a policy to ensure racial equality; and that there was prejudice against local African workers. They refer to the position alleged, as that of institutional discrimination by 1st respondent.

[42] The petitioners have urged the Court to appreciate that, the ascertainment of “indirect discrimination” is problematic, as it is so unique in its manifestation ¾ and therefore, difficult to prove. They have urged the Court to focus on the outcome of indirect discrimination, which they contend, reflects itself in systematic inequalities in society.

[43] The 1st respondent, on the other hand, has refuted the claims of institutional discrimination. For this party, it is submitted that the particulars of institutional discrimination in the petition are novel issues, not at all pleaded at the trial Court; and that parties must be bound by their pleadings. The 1st respondent also relies upon the supplementary affidavit by Dr. Solomon Mpoke, which affirms that there had been, indeed, anti-discrimination policies guiding the operations of KEMRI. The party submits further, that all allegations by the petitioners had drawn proper responses through the affidavit of Margaret Rigoro, as well as the supplementary affidavit of Dr. Solomon Mpoke.

[44] The Court of Appeal affirmed that the trial Court had failed to consider both the replying affidavit by Margaret Rigoro and the supplementary affidavit of Dr. Solomon Mpoke, even though the two affidavits contained the crucial response by the petitioners. We have gleaned the essentials of the trial Court Judgment, and we agree with the Appellate Court, that the two affidavits were entirely overlooked. We have perused the said affidavit of Margaret Rigoro, the legal officer of the 1st respondent, dated 27 April 2012. Annexed to this affidavit is a copy of the memorandum of understanding between KEMRI and Wellcome Trust (marked MR-1); a copy on guidelines and policies on harassment in the work-place (marked MR-2); staff terms and conditions (marked MR-3); e-mail communications on equal work, equal pay and equal opportunity; reviewed salary scales for researchers (marked MR-10). There are nine other annexures in this affidavit, attempting to respond to the allegations made by the petitioners. Similarly, the supplementary affidavit by Dr. Solomon Mpoke is accompanied by a certain number of annexures. The depositions of the two have given details of how the foreign researchers were employed; the mode of engagement between KEMRI and the Wellcome Trust; investigations upon the issues raised by the petitioners; responses on racial-discrimination claims; responses on allegations made regarding training and career stagnation; capacity development under the programme; nature of employment for the petitioners; and other related matters. It is unfortunate that the trial court did not consider these affidavits. Such issues, it is our perception, went to the very core of the work-relations between the petitioners and the 1st respondent, and, consequently, they would be the very basis of the legal reference-points defining the scenario of rights, justice, fair-play, and constitutional entitlements marking the state of employment relations.

[45] The petitioners, though blaming the Appellate Court for considering the affidavit of the 1st respondent while overlooking their evidence, have not shown precisely how that Court ignored their evidence.

[46] The petitioners contest the Appellate Court’s finding that they failed to discharge their burden of proof, that any differentials in pay were unreasonable, unaccountable, and therefore, discriminatory. The petitioners urge that once they proved what they

perceived as a *prima facie* case, the burden ought to have shifted to the 1st respondent, to establish that discrimination played no part in the employment set-up. According to the petitioners, the onus of proof, in discrimination cases, ultimately lies with "the violator", once the complainant raises the issue of discrimination. The Appellate Court held that it was incumbent upon the petitioners to prove that they were treated differently, that they suffered prejudice, on account only of their skin-colour, or racial background.

[47] It is a timeless rule of the common law tradition ¾ Kenya's juristic heritage ¾ and one of fair and pragmatic conception, that the party making an averment in validation of a claim, is always the one to establish the plain veracity of the claim. In civil claims, the standard of proof is the "balance of probability". Balance of probability is a concept deeply linked to the perceptible fact-scenario: so there has to be *evidence*, on the basis of which the Court can determine that it was more probable than not, that the respondent bore responsibility, in whole or in part.

[48] The petitioners' case is set around the constitutional right of freedom from discrimination (Constitution of Kenya, 2010, Article 27). It is already the standpoint of this Court, as regards standard of proof, that this assumes a higher level in respect of constitutional safeguards, than in the case of the ordinary civil-claim balance of probability. The explanation is that, virtually all constitutional rights-safeguards bear generalities, or qualifications, which call for scrupulous individual appraisal for each case. This is the context in which the rights-claim in the instant case, founded upon racial discrimination, is to be seen.

[49] Section 108 of the Evidence Act provides that, *"the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;"* and Section 109 of the Act declares that, *"the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."*

[50] This Court in ***Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others,*** Petition No. 5 of 2013**,** restated the basic rule on the shifting of the evidential burden, in these terms:

"…a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden…."

[51] In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.

[52] The allegations of discrimination are captured in various e-mails, affidavits, and the petition itself. The petitioners have not denied that they were engaged in an employment contract with the 1st respondent, which contract expressly stipulated the terms of engagement. The affidavit of Magaret Rigoro brings this out, and also explains how foreign researchers were engaged by the 1st respondent, even though 1st respondent had no control over the terms of their employment. This has not been controverted by the petitioners, who merely claim that such lack of control had exposed them to discrimination.

[53] In spite of the commonplace that proof of "indirect discrimination" is difficult, the petitioners ought to have provided sufficient evidence before the Court, to enable it to make a determination. The 1st respondent, by a more positive scheme, went ahead to counter the bare allegations. The petitioners failed, in this regard, to discharge their initial burden of proof.

[54] The petitioners have alleged that their right to property, under Article 40 of the Constitution, was violated by the 1st respondent. They have asked the Court to determine whether innovations made when an employee is not in employment belongs to the employer, under Section 13(2) of the Industrial Property Act, or not. They claim that the 5th petitioner made some innovations at a time when he was out of employment, during one of the several multiple contract-gaps. They have provided e-mail conversation with one Alex Aiken, who offers to pay a consultancy fee, so that an IT expert can gain access, and transfer information from IMRS (Integrated Records System), that the 5th petitioner had developed. The petitioners have also claimed that the 1st respondent has, on many other occasions, compromised their right to intellectual property by way of "disregard syndrome", "Mathew Effect", "citation amnesia" ¾ and this, they perceive as the hallmark of "indirect discrimination" in a scientific setting, offending Section 5(8) of the Employment Act.

[55] The 1st respondent, in response, states that the allegation that 5th petitioner, Dr. Moses Nderitu, made some innovation while being out of employment, was not part of the issues pleaded at the Employment and Labour Court. Besides, 1st respondent urged that, at the material time, the petitioners were working as employees of KEMRI, while also being Ph.D. students supported by KEMRI, working under experienced mentors or researchers ¾ all in their capacity as employees of KEMRI.

[56] The Appellate Court was guided by clause 13 of the petitioners' contract of employment, which provided that any intellectual property, including patents and copyrights arising in the course of KEMRI operations, shall belong to the Institute. The Appellate Court also relied on the terms of Section 32(1) of the Industrial Property Act, which provides that in the absence of contractual provisions to the contrary, the right to a patent for an invention made in the course of performance of a task under the employment contract, shall belong to the person who commissioned the work, namely, the employer.

[57] Section 32 (5) of the said Act provides for the entitlement of the employee, as follows: "*Inventions made without any relation to an employment or service contract and without the use of the employer's resources, data, means, materials, installations or equipment shall belong solely to the employee or the person commissioned*."

[58] It is evident, in our view, given the foregoing statutory provisions, that the Appellate Court did take the valid and proper standpoint in law: it behoved the petitioners to show that their claim fell within the terms of Section 32 (5) of the Industrial Property Act, as a basis of claim against 1st respondent.

[59] The petitioners' claim in respect of Dr. Moses Ndiritu, however, raises its own difficulty. A look at the suit before the Employment and Labour Relations Court shows that, the claim that Dr. Ndiritu had made innovations falling outside the employment framework under KEMRI, did not feature at all in the pleadings. This fact negates a crucial judicial-process element, which is vital in the quest for justice: and, accordingly, we would not allow a fresh claim at this ultimate appellate stage.

[60] We have considered e-mail communications in respect of which the petitioners alleged violations of intellectual property rights. It is not, however, possible to ascertain the point in time when such alleged innovations were made, or the manner in which they were made ¾ so as to enable us to relate them to the period of the employment-relationship with 1st respondent. The particulars of such violations are also inadequately focussed, in their formulation; and this renders it difficult for the Court to relate them to the petitioners herein. The overall effect is that the petitioners did not establish the claim, that they had made innovations of the nature of industrial property, outside their employment, and which 1st respondent did compromise.

[61] The last issue is the failure by the Court of Appeal to determine the cross-appeal filed by the 4th respondent. The Appellate Court did, indeed, make reference to the cross-appeal in its Judgment, though without determining it. The petitioners and the 4th respondent argue that this is denial of justice.

[62] We have considered the details of the cross-appeal, dated 9 January 2019. Its claim is that the trial Judge erred in failing to calculate and to award benefits such as payment for unfair termination of services, payments in lieu of leave; unpaid salary in lieu of notice, and other outstanding payments. It emerges that the trial Court declined to consider the issue of unfair termination, as the contract involving the petitioners had already ended.

[63] The 1st respondent has urged that the cross-appeal was inter-related with the main appeal, and that it necessarily collapsed, with the dismissal of the appeal. There is no doubt that, for the regularity and normalcy of the trial process, the cross-appeal ought to have been determined. As such an opportunity was missed, the proper question now before this Court is: is there a remedy to be granted"

[64] No doubt exists, that the contract involving the petitioners had come to an end. Indeed, the petitioners have not denied that they were magnanimously paid, even for the period during which they rendered no work. This is clear from the Judgment of the Court of Appeal. The Appellate Court, however, had not clearly stated that the cross-appeal lacked merit. If we were now to refer this cross-appeal back to the Appellate Court, for determination, we would not expect anything different. The petitioners having failed to discharge their evidential burden, the plea of unfair process stood unproven, and there was no material before the Court to show unfair determination. In our view of the goals of justice, we see no need to refer the cross-appeal back to the Appellate Court.

E. ORDERS

[65] Our detailed consideration of this case, now culminates in the following Orders:

(a) The petition of appeal dated 19 March 2019 has no merit, and is hereby disallowed.

(b) The parties shall bear their own individual costs.

DATED and DELIVERED at NAIROBI this *10th* day of *January, 2020.*

…….. **……**

M. K. IBRAHIM **J. B. OJWANG**

JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

……. **…….**

S.C. WANJALA **NJOKI NDUNGU**

JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

…….

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA