



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 294 OF 2019

(CORAM: W. KARANJA, OKWENGU & SICHALE, J.J.A)

BETWEEN

THE COUNTY GOVERNMENT OF GARISSA.....1ST APPELLANT

THE GOVERNOR OF GARISSA COUNTY.....2ND APPELLANT

AND

IDRISS ADEN MUKHTAR.....1ST RESPONDENT

MUKHTAR BULALE.....2ND RESPONDENT

SALAH YAKUB FARAH.....3RD RESPONDENT

(An appeal from the Judgment and Decree of the Employment and Labour Relations Court at Nairobi (**Hellen Wasilwa, J.**) delivered on 27th October, 2016

in

Constitutional petition No. 46 of 2015)

JUDGMENT OF THE COURT

[1] This appeal originates from a constitutional petition that had been filed by **Idriss Aden Mukhtar** (1st respondent), **Mukhtar Bulale** (2nd respondent) and **Salah Yakub Farah** (3rd respondent), in the Employment and Labour Relations Court (E&LRC).

[2] In the petition the respondents who were Garissa county executive committee members, sued the county government of Garissa (1st appellant) and the Governor of Garissa County (2nd appellant), herein referred to as Governor, alleging that the two had violated their constitutional rights and freedoms as provided under Articles 27, 28, 41, 47 and 48 of the Constitution, by dismissing them from their employment unconstitutionally. Consequently, the respondents sought orders, including an order of judicial review quashing the decision of the Governor made by letters dated 22nd May, 2015 relieving the respondents of their duties as county

executive committee members; and prohibiting the respondents from appointing any fresh nominee as members of Garissa county executive committee. In the alternative, the respondents sought an order for payment of all monies due to them for the period that they would have served up to the end of their contract term.

[3] Each of the respondents swore an affidavit in support of the petition. Each respondent has annexed a copy of his letter of termination to the supporting affidavit. The letters of termination, which were all signed by the Governor, were effective immediately.

The letter of the 1st and 3rd respondents were identical in so far as the reasons given for the termination were concerned. The reasons were; first, traveling to destinations outside the country without proper sanction from the office of the governor; and secondly, unauthorized regular absence from office, which had resulted in service delivery to the public being hampered. For the 2nd respondent, the reasons were, failure to implement key policy decisions relating to his department, and failure to supervise the administration and service delivery of the water department and other related agencies of the county.

[4] The 1st and 3rd respondents each maintained that their travels outside the country were properly sanctioned. They denied being regularly absent from the office and claimed that they had properly performed their functions. The 2nd respondent also similarly denied failing to properly implement key policy decisions or supervise the administration and service. He contended that he single handedly prepared the county fiscal strategy paper and performed his duties as the minister for water. He had difficulties in performing his duties because of the Governor micro managing the activities, and this made it difficult for him to access the budget. He maintained that his summary dismissal was done in blatant disregard of due process and procedure laid in the County Government Act. The three respondents maintained that their termination was motivated by ill will arising from their questioning the way the Governor was micro managing the activities of their departments and their expressing dissatisfaction with the budgetary process. The respondents maintained that they were not given any hearing before their termination of employment.

[5] The appellants responded to the petition through a replying affidavit sworn by **Mohammed H. Mursal** (Mursal) who was at the material time a county secretary and head of county public service in Garissa County. He swore that the Governor properly exercised his constitutional and statutory mandate in terminating the respondents' employment and that three days later on 25th May, 2015 he properly exercised statutory powers in appointing persons to fill their positions. Mursal stated that he had requested for an explanation from the 1st and 3rd respondents in regard to the alleged foreign trips but that the 1st and 3rd respondents refused, failed or neglected to respond to his letter. He explained that the foreign trip which was a trip to Vienna was not authorized by the Governor or the national government. He had received complaints of absenteeism against the 1st and 3rd respondents and established that no authority was sought or given for their absence.

[6] As regards the 2nd respondent, Mursal stated that he failed to discharge work entrusted to him by the governor. A letter addressed to him seeking an explanation for that failure, was not responded to. In addition, Mursal swore, the respondents had gone to court in bad faith. He urged the Court to dismiss the petition.

[7] At the hearing of the petition the three respondents relied on their affidavits as well as their oral evidence and also called 5 witnesses, while Mursal relied on his affidavit and also testified for the appellant. The parties' counsel also made oral submissions each urging the court to rule in favour of his client. Upon considering the petition the evidence adduced and the submissions, the learned Judge delivered a judgment on 27th October, 2016 in which she ruled in favour of the respondents and made orders as

follows:

“(i) A declaration that the act of 2nd respondent in relieving the petitioners of their duties is a breach of the latter’s constitution (sic) rights under Article 47 and 50(1) of the Constitution.

(ii) That the petitioners are henceforth entitled to damages equivalent to 12 months’ salary as damages for unlawful termination as per their pay slips = 12 x 339,375 =4,072,500/- each.

(iii) Prayer for reinstatement will not suffice given the short length of service to be served from this point.

(iv) The termination will be considered a normal termination and the petitioners are also entitled to 1 months’ notice in lieu of notice, and any other benefits under the contract including gratuity for the period to date and any accrued leave not taken.

(v) Respondents’ to pay costs of the petition.”

[8] On 6th September 2017, the Deputy Registrar duly issued a decree in accordance with the judgment of the E&LRC. Following an application that was made by the respondents (but which does not appear to be part of the record before this Court), the parties’ counsel appeared before the learned Judge who made an order amending the figure on the decree to read Ksh.15.736,562/50. It is noteworthy that the appellants were represented by counsel who indicated he was not objecting to the amendment. On 31st May, 2018, the respondents’ counsel appeared before the learned Judge and upon informing the judge that no interest was provided in the decree, the learned Judge directed that the decree be drawn with the decretal sum inclusive of interest at 6% as was prayed in the claim.

[9] The appellants being aggrieved by the judgment have filed a memorandum of appeal raising 21 grounds, which in their written submissions, they have compressed into 4 grounds as follows:

“(a) The learned Judge of the superior court misapprehended the law in applying the provisions of the Employment Act to the termination of the respondents herein;

(b) The learned Judge of the Superior court was misguided in finding and implying that section 31(a) of the County Government Act was repealed and inapplicable;

(c) The learned Judge of the superior court erred in failing to find that the respondents’ petition had not attained the threshold set out in Anarita Karimi case;

(d) Who should bear the costs of the appeal and of the proceedings in the Employment and Labour Relations Court’”

[10] The appellants’ written submissions were duly highlighted by their counsel **Mr. Nyaanga** who appeared together with **Mr. Githinji Mwangi**. The appellants argued that the respondents were State officers whose employment was governed by the Constitution and the County Government Act, and therefore the learned Judge erred in applying the Employment Act to test the legality of the respondents’ termination. In support of that proposition, a decision of this Court, **County Government of Nyeri & anor vs Cecilia Wangechi Ndung’u [2015] eKLR (Cecilia Wangechi Ndungu decision)**, was cited.

[11] In addition, the appellants submitted that the learned Judge misdirected herself in finding that section 31(a) of the County Government Act was repealed; that the Governor is empowered under that section to dismiss a county executive member at any time, if he considers it appropriate or necessary to do so; that the respondents' employment was terminated for absenteeism from work without leave, poor performance and failure or refusal to show cause when required to do so; and thus the Governor's action was within the law and cannot be faulted as arbitrary or whimsical.

[12] The appellants argued that the respondents' petition had not attained the threshold set out in the Anarita Karimi Njeru vs Republic Misc. Cr. Application No. 4 of 1979, (Anarita Karimi Njeru case) as the petition did not set out with precision the specific provisions of the Constitution, which were violated and the manner and extent to which the provisions were violated; that it was not enough for the respondents to merely mention provisions of the Constitution without demonstration of clear violation of those provisions; and that the learned Judge erred in failing to find the petition incompetent. Finally, the appellants took issue with the alteration of the judgment and decree from the amount awarded totaling Ksh.4,072,500/- per respondent to Ksh.15,736,562/50 per respondent, after delivery of the judgment and when the court was already *functus officio*. The Court was urged to allow the appeal and award costs to the appellant.

[13] For the respondents, it was submitted that the reasons leading to their termination as stated in the letters were unsubstantiated, untruthful and discriminatory. That the reality was that the decision was based on prejudice against the respondents' sub-clan and the fact that the respondents had signed and forwarded a joint memorandum to the county assembly bringing to the fore issues of budgetary allocation and mismanagement of funds.

[14] The respondents identified the issues raised in the appeal to include: whether the pleasure doctrine was applicable to the respondents' termination of employment; whether the Employment Act was applicable to State officers; whether there was unfair termination of the respondents' employment; whether the court disregarded the appellants' submissions; whether the trial court made exorbitant and unreasonably high award to the respondents; whether the constitutional petition failed to conform to the requirements in the Anarita Karimi Njeru case; and whether the learned Judge could perfect her judgment after delivery.

[15] In regard to the pleasure doctrine, the respondents submitted that their position as members of the county executive committee was a constitutional office subject to both the letter and the spirit of the Constitution, and therefore they were not serving at the whim of the appointing authority. The respondents relied on Narok County Government & Anor vs. Richard Bwogo Birir & Anor [2015] eKLR (Richard Bwogo Birir decision), where this Court referring to the Cecilia Wangechi Ndungu decision (*supra*), stated as follows:

“32. We obviously respect the decision of our sister bench to the extent that the original doctrine has

been severely restricted over time, and that the current Constitution took away the notion that sovereign power was vested in individuals or certain offices and could be exercised at the will of the said individual or office. However, we respectively differ with the finding that the pleasure doctrine has been preserved under Section 31(a) of the County Governments Act. We think for ourselves that the construction of the section must be made in the right context...

46. The above learning leads us to the finding that the Governor's contention that his power to dismiss can be exercised without any reasons being advanced has no basis in law. It is the reasons for dismissal that determine whether the power was exercised reasonably, and the reasons ought to be valid and compelling”

[16] The respondents submitted that the appointing authority must have justification and rational reason for exercising the

power to terminate employment, and the learned Judge having found that the appellants had failed to establish any good reason for their action, the pleasure doctrine could not apply. In regard to the application of the Employment Act to State officers, the respondents relying on **Cecilia Wangechi Ndungu** decision, reiterated that a State officer's terms and conditions of service are regulated by the Constitution, the relevant statute, principles of fair administrative action and rules of natural justice. The respondents pointed out that the appellants not only violated the Constitution, but even the **County Governments Act (CGA)**, and that the provisions violated were in *pari materia* to the Employment Act, specifically the unfairness in dismissal and failure to follow statutory procedure as provided under Sections 45(2) and 41 of that Act.

[17] In regard to unfair termination, the respondents urged that the burden was on the appellants to establish their alleged reasons for the termination, and this the appellants failed to do. Further, the respondents were served with termination letters via email without any hearing, and therefore the appellants failed to give the respondents a fair hearing before terminating their employment.

[18] As regards the award of damages, the respondents maintained that the learned Judge gave justification for the award; that the learned Judge only rectified and perfected the judgment following a correct computation of the amount payable and this was not opposed by the appellants' counsel; that the award was not exorbitant or unreasonable as the court had only awarded 12 months' salary as damages, while the respondents had prayed in the alternative for payment of all their dues up to the end of their term.

[19] In regard to the particulars of the respondents' claim, it was submitted that at paragraph 12 and 13 of the petition, the respondents had set out precisely the specific Articles of the Constitution that had been breached by the appellants and expounded on the manner in which the breach occurred. Relying on **S.W.M. v G.M.N. [2012] eKLR** a High Court decision, the respondents maintained that the particulars provided were sufficient to enable the appellants respond to the allegations and for the court to know the specific rights, which it was required to enforce.

[20] On perfection of the judgment, the respondents submitted that there are exceptions to the principle of finality of a case, depending on the circumstances of each case; that a court is not barred from any engagement with a suit it has already decided, provided it is not a merit based decision or re-engagement. The respondents submitted that the learned Judge was moved to perfect the judgment, which the learned Judge did exercising her inherent jurisdiction; and that in any case, the learned Judge acted on what both parties' advocates had consented to.

[21] Finally on the issue of costs and interest, the respondents urged that the costs should follow the event, and that under Section 26 of the Civil Procedure Act, the court had discretion to order payment of interest of the decretal sum.

[22] We have carefully considered the appeal and the submissions made by the respective parties. This being a first appeal, this Court is obligated to reconsider and analyze the evidence that was adduced before the trial court, with a view to making its own conclusions and determination with regard to the matters in issue (see **Selle vs Associated Motor Boat Company [1968] EA 123.**)

[23] It is not disputed that the respondents were appointed as members of the 1st appellant's county executive committee, and that on 22nd May 2015, each respondent was served with a letter signed by the Governor terminating their employment with immediate effect. The main issue is whether the appellants' actions violated the respondents' constitutional rights, and whether the respondents are entitled to any damages. In considering this issue, several other auxiliary issues arise, and this is whether the Employment Act and the CGA was applicable to the respondents who were State officers. Secondly, whether the Governor had powers to dismiss the respondents under the pleasure doctrine, or whether employment of the respondents was unfairly terminated, and if so, whether the damages awarded to the respondents was proper. There is also the issue whether the learned Judge had the

jurisdiction to make orders amending to the amount awarded in the judgment after the judgment had been delivered.

[24] The appellants and the respondents have an employer employee relationship. That notwithstanding, the respondents opted to anchor their petition on the Constitution rather than the employment contract. The fundamental rights and freedoms enshrined in the Constitution includes the right to fair labour practices (Article 41), and the right to fair administrative action (Article 47), which rights the respondents sought to enforce. In **Anarita Karimi Njeru vs. Republic [1979] eKLR** the High Court stressed that it was imperative that a person seeking redress from the High Court on a matter which involves a reference to the Constitution should set out with a reasonable degree of precision that of which he complains, that is, the constitutional provisions said to be infringed, and the manner in which they are alleged to be infringed.

[25] The respondents did not include a specific paragraph in the petition entitled “**particulars**”. However, the substratum of the respondents’ claim is contained at paragraphs 11, 12 and 13 of the petition that states as follows:

“11. The 1st and 2nd respondents have in blatant violation of various provisions of the Constitution of Kenya and various statutory provisions purported to relieve the petitioners of their duties as County Executive Committee Members in charge of Youth, Sports, Trade investments, Enterprise development and Cooperatives, Water, Environment, Energy and Tourism respectively in a manner that is disrespectful and disregarding.

12. In blatant violation of the listed provisions of the Constitution of Kenya, the County Government Act, and other written laws the respondents have purported to dismiss the petitioners herein from their duties as County Executive Committee members in circumstances that are illegal, unreasonable and unconstitutional in that:

- a. the petitioners were relieved of their duties without any sufficient reasons for such;**
- b. the petitioners were relieved of their duties without being given a fair hearing or without being afforded any opportunity for a fair hearing.**

13. In exercising of his duties under Section 40(1) of the County Governments Act No. 17 of 2012, the 2nd respondent outrightly violated the Constitutional and Statutory considerations thus violating the petitioners’ rights and freedoms as follows:

- a. by dismissing the petitioners, their rights to a fair hearing and fair labour practices contrary to provisions of Article 41(1) of the Constitution have been violated.**
- b. by dismissing the petitioners by giving fictitious reasons for the said dismissal, the 2nd respondent acted contrary to Article 47 of the Constitution on fair administrative action.”**

[26] The drafting of paragraphs 11, 12, and 13 certainly leaves a lot to be desired. Paragraph 11 talks generally about provisions of the Constitution and statute alleged to have been violated without identifying the provisions. Paragraph 12 also talks about provisions of the Constitution under County Government Act without identifying these provisions. Paragraph 13 is more specific particularizing that the respondents’ right to fair hearing and labour practices provided under Article 41 of the Constitution, and right to Fair Administrative Action under Article 47 had been violated by the dismissal of the respondents without proper reasons. Therefore, paragraph 11 and 12, read together with paragraph 13 in the context of the previous paragraphs in the petition, that is

paragraphs 7 to 10, which identified the relevant fundamental rights in the Constitution, and Section 40 and 30(2)(a) of the CGA, in regard to dismissal of county executive committee members, and the appellants' obligation to perform their duty diligently as provided in the Constitution and the statutes, gives clarity to the respondents' complaints regarding the infringement of their constitutional rights vis-à-vis the specific provisions and the manner of infringement. The appellants cannot therefore claim not to have understood the facts complained of and the provisions of the law upon which the respondents' cause of action was anchored. Consequently, we reject this ground.

[27] Notwithstanding their position as state officers, the respondents were entitled to their fundamental rights and freedoms under the Constitution, which includes right to fair labour practices and right to fair administrative action. Furthermore, both the appellants are obliged under Article 21 of the Constitution to '*observe, respect, protect, promote and fulfil*' these fundamental rights. In addition, as State officers, the respondents have a right under Article 236 of the Constitution, to due process in the termination of their employment.

[28] The preamble to the Constitution shows that the Constitution was a realization of the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice, and the rule of law, and the need for the people of Kenya to exercise their sovereign and inalienable right to determine the form of governance of the country, having fully participated in the making of the Constitution. At the outset, Article 1 of the Constitution is clear that all sovereign power belong to the people of Kenya, and that the sovereign power which is exercised at national and county level, is delegated to State organs which perform their functions in accordance with the Constitution. Among the State organs to whom sovereign power is delegated is the national executive and the executive structures in the county government.

[29] Under Article 179 of the Constitution, the executive authority of the county is vested in and exercised by a county executive committee consisting of a county governor, deputy county governor, and members appointed by the county governor, with the approval of the assembly. The members of the county executive committee are accountable to the County Governor for the performance of their functions and exercise of their powers. The Constitution has not provided for the manner of removal of the members of the county executive, and therefore we must read the Constitution together with the County Government Act No. 17 of 2012, which was enacted pursuant to Article 200 of the Constitution, to provide for amongst others, "**the manner of election or appointment of persons to, and their removal from, offices in county governments**".

[30] In this regard, Section 31 and 40 of CGA provides for removal of members of the county executive committee as follows:

“31. Powers of the governor

The governor—

(a) may, despite section 40, dismiss a county executive committee member at any time, if the governor considers that it is appropriate or necessary to do so;

(b) shall dismiss a county executive committee member, if required to do so by a resolution of the county assembly as provided under section 40;

(c) may appoint an accounting officer for each department, entity or decentralized unit of the county government; and

(d) shall have such powers as may be necessary for the execution of the duties of the office of governor.

40. Removal of member of executive committee

(1) Subject to subsection (2), the Governor may remove a member of the county executive committee from office on any of the following grounds—

(a) incompetence;

(b) abuse of office;

(c) gross misconduct;

(d) failure, without reasonable excuse, or written authority of the governor, to attend three consecutive meetings of the county executive committee;

(e) physical or mental incapacity rendering the executive committee member incapable of performing the duties of that office; or

(f) gross violation of the Constitution or any other law.

(2) A member of the county assembly, supported by at least one-third of all the members of the county assembly, may propose a motion requiring the governor to dismiss a county executive committee member on any of the grounds set out in subsection (1).”

[31] Of note is that while Section 40 of the CGA gives the County Governor powers to remove a member of the county executive committee on specified grounds, following a clear process initiated by the county assembly, Section 31(a) of the CGA gives the County Governor a wide discretion to dismiss a member of the executive committee on his, that is the governor’s own initiative, where the Governor considers it appropriate and necessary to do so. In the respondents’ letters of termination, the Governor invoked his powers under Section 31(a) in dismissing the respondents.

[32] Two differently constituted benches of this Court have had occasion to consider the application of Section 31(a) of the CGA. The first decision was the **Cecilia Wangechi Ndungu** decision where the Court, after an extensive analysis of the pleasure doctrine including consideration of comparative jurisprudence from several jurisdictions, expressed itself as follows:

“37. We are of the considered view that the Section 31 (a) grants power to a Governor to dismiss a member of the County Executive Committee at any time, that is, at his pleasure. However, we find that the said power is qualified to the extent that he can only exercise the same reasonably and not arbitrarily or capriciously. Why do we say so”

38. Firstly, By dint of Article 179(1) of the Constitution and Section 34 of the County Governments Act the executive authority of a County is vested in the County Executive Committee. The County Executive Committee comprises of the Governor, Deputy Governor, members of the County Executive Committee who are appointed by the Governor. The members of the County Executive Committee assist the Governor to carry out his mandate under the law. It is the Governor who assigns to

every member of the County Executive Committee responsibility to ensure the discharge of any function in the County. This is the reason why the County Executive Committee members are individually and collectively accountable to the Governor in the exercise of their powers and performance of their duties and responsibilities. (See Article 179 (6) of the Constitution and Section 39 of the County Governments Act.) A County Executive Committee member is the Governor's right hand in his/her respective office. Hence the Governor has to have confidence in the County Executive Committee member. Where such confidence is lost the Governor ought to have the capability of removing such a member without undue delay so as to enable the County Executive Committee to function for the benefit of the County.

39. *Secondly, Section 31 (a) provides that a Governor may dismiss a County Executive Committee member at any time, if he/she considers that it is appropriate or necessary to do so. We find that the provision places an obligation on the Governor to exercise the said power only when necessary or appropriate. In our view this entails reasonableness on the part of the Governor in exercising this power. In Dunsmuir -vs- New Brunswick (supra) the Supreme Court while discussing reasonableness observed:-*

"47. Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness; certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions.A court

conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

Further, by virtue of the fact that a Governor ought to exercise his powers for the public good he should not act on selfish motives but for the benefit of his/her county. We find that the reasons for exercising the said power ought to be valid and compelling and will depend on the circumstances of each case. Consequently, the power to dismiss a member of the County Executive is qualified to the extent that the same ought to be for the benefit of the County and in accordance to the principles of devolution as set out herein above."

[33] Thus, the Court in the **Cecilia Wangechi** decision concluded that Section 31(a) of the CGA gives power to a Governor to dismiss a member of the county executive committee at his pleasure, but that the power can only be exercised reasonably and not arbitrarily or capriciously.

[34] The second decision was the **Richard Bwogo Birir** decision (supra), where this Court having considered the **Cecilia Wangechi** decision (supra) and noted that in that decision the Court had held that Section 31(a) of the CGA preserves the pleasure doctrine, stated as follows:

"32. We obviously respect the decision of our sister bench to the extent that the original doctrine has been severely restricted over time, and that the current Constitution took away the notion that sovereign power was vested in individuals or certain offices and could be exercised at the will of the said individual or office. However, we respectfully differ with the finding that the pleasure doctrine has been preserved under Section 31 (a) of the County Governments Act. We think for ourselves that the construction of the section must be made in the right context.....

33. *Firstly, it is significant, and there was a good reason for it, that the provisions of Sections 24 and 25 of the retired Constitution were not imported into the current Constitution. The pleasure doctrine also receives no express mention in the current Constitution. It is our Supreme Court which contextualized the philosophy behind the new Constitution and we pick it from The Matter of the Principle of Gender Representation in the National Assembly and the Senate, SC Advisory Opinion No. 2*

of 2012:-

“A consideration of different constitutions shows that they are often written in different styles and modes of expression. Some Constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and interact among themselves and with their public institutions. Where a Constitution takes such a fused form in terms, we believe a Court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other.”

.....

38. Article 73 provides that authority assigned to a State Officer is a public trust which ought to be exercised in a manner that is consistent with the purposes and objects of the Constitution. The authority vests in the State officer the responsibility to serve the people rather than the power to rule them. One of the guiding principles of leadership and integrity is accountability to the public for the decisions and actions taken. Under Article 174 one of the objectives of devolution is to promote democratic and accountable exercise of power.

39. It is upon consideration of those and other provisions that the trial court reached the following compelling conclusion:

“...all persons holding public or state office in Kenya in the executive, the legislature, the judiciary or any other public body and in national or county government are servants of the people of Kenya. The court holds that despite the level of rank of state or public office as may be held, no public or state officer is a servant of the other but all are servants of the people. Thus, the court holds that the idea of servants of the crown is substituted with the doctrine of servants of the people under the new Republic as nurtured in the Constitution of Kenya, 2010. The hierarchy of state and public officers can be complex, detailed and conceivably very long vertically and horizontally but despite the rank or position held, the court holds that they are each a servant of the people and not of each other as state or public officers. They are all servants of the people. The court holds that there are no masters and servants within the hierarchies of the ranks of state and public officers in our new Republic.

The court further finds that the string that flows through the constitutional provisions is that removal from public or state office is constitutionally chained with due process of law.

In the opinion of the court, at the heart of due process are the rules of natural justice. Thus, the court finds that the pleasure doctrine for removal from a state or public office has been replaced with the doctrine of due process of law. Article 236 is particularly clear on the demise of the pleasure doctrine in Kenya’s public or state service” “In the new Republic, the court holds that public service by public and state officers is guided by the doctrine of servants of the people and the doctrine of due process and not by the doctrines of the servants of the crown and the pleasure doctrine. In the opinion of the court, the demise of the pleasure doctrine and the demise of the doctrine of servants of the crown in the new Republic’s constitutional framework constitute the very foundation of the Republic, namely, Kenya is a sovereign Republic and all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution.”

With respect, we have considerable sympathy for those findings as they accord with the spirit and letter of the Constitution, 2010. Consequently, we find and hold that the pleasure doctrine is not applicable in Kenya under the current Constitution.”

[35] We have reconsidered the two decisions of this Court and the cases cited therein. In our view, the direction to take in this matter lies in an interpretation of section 31(a) of CGA in a way that conforms to the spirit and letter of the Constitution, as all laws must be interpreted and applied in accordance with this supreme law of the land. As already stated in this judgment, the people of Kenya in their wisdom adopted a Constitution that was anchored on sovereignty of the people and supremacy of the Constitution. Under this Constitution, the Governor and members of executive committee of a county government are state officers, that is, persons holding state office. Their power must be exercised in accordance with the Constitution. Indeed, it behooves such high ranking state officers to demonstrate commitment and fidelity to the Constitution.

[36] In a country like India where the pleasure doctrine is in force, the application of the doctrine has been specifically provided for in Article 310 of the India Constitution. As observed in the **Richard Bwogo Birir** decision, unlike the previous Constitution, the current Constitution of Kenya has not specifically entrenched the pleasure doctrine. In our view, this omission is not by accident or inadvertence, but a deliberate omission because the pleasure doctrine is not compatible with the spirit and letter of the current Constitution. The doctrine is inimical to the national values of human rights, good governance, transparency and accountability which are the hallmark of the delegated sovereign power and position of public trust. Therefore, the appointment of state officers must be insulated from political or any untoward interference. If Section 31(a) of the CGA was to be interpreted as giving the Governor unfettered discretion to dismiss a county executive member at any time, if he, the Governor, considers it appropriate or necessary to do so, the yardstick would be personal and without transparency or accountability and this would be contrary to the principles and values espoused in the Constitution.

[37] In the **Cecilia Wangechi Ndungu** decision, the Court was at pains to show that Section 31(a) places an obligation on the Governor, to exercise his powers only when necessary or appropriate when it is for the public good, and when there are valid and compelling reasons. We are in agreement with that threshold and in our view, that threshold fetters the discretion of the Governor. He cannot be acting at his own pleasure, when he must have a reasonable ground to do so, and when he must act for the public good. That threshold is consistent with what **Ongaya, J.** in Petition No. 1 of 2014 (as quoted in the **Richard Bworo Birir** decision) described as the doctrine of due process because there must be a process to confirm that, that threshold has been met.

[38] A parallel was drawn between the powers of the President in appointing and dismissing Cabinet Secretaries as provided under Article 132(2) and Article 152(5)& (6) of the Constitution, and the powers of the Governor in appointing and dismissing members of the county executive committee as provided under Section 30 (2) (d) and 31 of the CGA. In the first place, unlike the Governor whose powers are statutory, the powers of the President are entrenched clearly in the Constitution. Section 31(a) of the CGA which provides the statutory powers to the Governor, must on the other hand, be interpreted and applied in accordance with the letter and the spirit of the Constitution to which the statute is subservient. Besides, unlike the powers of the Governor which can only be exercised when there is a good reason that makes it necessary and appropriate to do so, the powers of the President in the dismissal of Cabinet Secretaries has not been fettered by any such requirement.

Therefore, the powers granted to the President and the Governor are not comparable.

[39] It is for these reasons that we reiterate this Court's holding in the **Richard Bwogo Birir** decision, that the pleasure doctrine was not preserved under Section 31(a) of the CGA. Nor do we agree that the section allows the Governor to dismiss members of the county executive without observing any procedures or assigning any reasons. Section 31(a) merely gives the Governor the discretion to dismiss a county executive member for a reason and process other than that stated in Section 40 of the CGA, subject to

due process being followed.

[40] It is not lost on us that the Governor is the political leader of the county, and that he is aligned to a specific political party. It is natural that he would identify for appointment as members of his county executive committee, persons who are committed to his cause and whom he has confidence in. Section 31(a) would therefore come in handy where the Governor has reason to lose confidence in an executive committee member due to sabotage or such like activity that would hamper proper governance of the county.

[41] This means that there must be reasons upon which it can be concluded that the powers of the Governor have been exercised in good faith and for proper reasons and not arbitrarily or capriciously. It cannot be as the appellants appear to contend, that the Governor is entitled to fire the respondents at will without any reason and without due process. That would be contrary to the respondents' constitutional rights to fair labour practices and the right to fair hearing. Thus, the appellants had to satisfy the court not only that the Governor had a good reason for the termination of the respondents' employment, but also that the reason for the termination was one which justified urgent action under Section 31(a) of the CGA. Secondly, the Governor had to satisfy the court that in taking the action, due process was followed and a fair hearing given to the respondents.

[42] The appellants admitted having terminated the respondents' employment but maintained that it was entitled to do so, because of the respondents' conduct. In other words, they were alleging gross misconduct on the part of the respondents. The evidential burden shifted to the appellants to establish the allegations made against the respondents, and satisfy the trial court that the allegations provided compelling reasons that made it necessary or appropriate for the Governor to take the action of dismissing the respondents. In addition, the appellants had to demonstrate that due process was followed in the removal process.

[43] The only witness who testified for the appellants was the County Secretary and Head of Public Service whose name was indicated in the replying affidavit sworn on 27th October, 2015 as **Mohamud H. Mursal**, and in the proceedings as **Mohammed H. Nursan**. We take it that he is one and the same person who swore the affidavit and testified, and we shall refer to him as **Mursal**. The reasons given in the letter of termination of the 1st and 3rd respondents, were allegations that they went out of the country without permission, and that they were also guilty of absenteeism.

[44] Mursal annexed to his affidavit a request from the 1st respondent for 8 days per diem payment for travel to Israel for a conference between 2nd and 10th December, 2014. The request was processed and the payment of per diem made. The 1st respondent admitted having traveled to Israel, Italy and Netherlands, but maintained that the trips were sanctioned by the office of the Governor. He annexed to his affidavit a letter of invitation and a letter from the county director of communications. He explained that his trip was successful and resulted in the Governor leading a delegation to Netherlands from the county government. A letter dated 4th May, 2015 from the economic adviser to the Governor was exhibited. These allegations were not denied by the Governor.

[45] The evidence of **Ishmael Aden Laber** who was a legal officer to the 1st appellant was consistent with that of **Mursal** that the issue of the respondents having proceeded on foreign trip without authority had been raised before the county assembly, who had summoned the respondents to appear before it. The 1st and 3rd respondents annexed a copy of the summons dated 18th May, 2015 that required them to appear before the county assembly on 22nd May, 2015. The Governor could not therefore short-circuit a process that was before the county assembly, by purporting to act under Section 31(a) of the CGA.

[46] With regard to absenteeism, part of the time when the 1st and 3rd respondents were said to be away, was the time when they had gone out of the country on the trip that was subject of the termination of their employment. Both the respondents

maintained that they had the permission of the Governor to travel out of the country and that the trip was an official trip for the benefit of the county government.

[47] PW6 who was the communications officer in the office of the Governor testified that the Governor gave him instructions to nominate the 1st and 3rd respondents to travel out of the country. The 1st and 3rd respondents maintained that they had in fact talked with the Governor who was not only aware of the trip but had also approved it. As the Governor chose not to adduce any evidence by way of affidavit or oral evidence, we have no reason to doubt the evidence of PW6 or the evidence of 1st and 3rd respondents in regard to the travel.

[48] All the three respondents maintained that they never absented themselves from duty without any authority, and that apart from their absence due to the trip outside the country, they occasionally had to be away from the office on official duties. In this regard, **Abdullahi Omar Abdi**, (PW4) who was at the material time a driver attached to the 1st respondent, identified the work tickets for the period when the 1st respondent was alleged to be absent, and reiterated that they were away on official assignment and that he was paid the appropriate per diem. Again, there is nothing to contradict the evidence of this witness and we have no reason to doubt him.

[49] Besides, the allegations against the respondents were not of the nature that could grossly impact on the Governor's confidence in the respondents, nor were the matters sensitive or urgent as to justify the Governor exercising his discretion under section 31(a) of the CGA.

[50] In our view, the Governor misinterpreted his powers under Section 31(a) of the CGA, as giving him a free hand to dismiss the respondents at his pleasure, and therefore did not give them any hearing before termination of their employment. This was a clear breach of the respondents' rights to fair labour practices under Article 41(2) of the Constitution and right to fair administrative action under Article 47 of the Constitution. It was also a breach of natural justice and therefore, the respondents' dismissal was unfair termination.

[51] In addition to the declaration that the Governor's action amounted to a breach of the respondents' constitutional rights, the learned Judge found it appropriate to award the respondents damages using the guide provided under Section 49(1) of the Employment Act. Therefore, we must address the issue whether the Employment Act was applicable to the respondents.

[52] In the **Cecilia Wangechi Ndungu** decision (supra), the Court had this to say on the applicability of the Employment Act:

“44. The Employment Act was enacted to govern the relationship of an employer and employee under a contract of employment. Part 6 provides an elaborate due process to be followed in the case of termination/dismissal of employees. It provides for the right to be notified of the intention to dismiss and a fair hearing.

45. Article 260 of the Constitution defines a State officer as a person holding a state office. The said Article set out the following as state offices:

....

46. We are of the considered view that the Employment Act does not apply to state officers. A state officer's terms and conditions of service are regulated by the Constitution or the relevant statute, principles of fair administrative action and rules of

natural justice. It therefore follows that a member of the county executive committee being a state officer is not subject to the provisions of the Employment Act.”

[53] With due respect to our sister bench, while we are in agreement that a state officer’s terms and conditions are regulated by the Constitution and relevant statutes, we are of a different view in regard to the application of the Employment Act. Section 3 of the Employment Act states as follows:

“3. Application

(1) This Act shall apply to all employees employed by any employer under a contract of service.

(2) This Act shall not apply to—

(a) the armed forces or the reserve as respectively defined in the Armed Forces Act (Cap. 199);

(b) the Kenya Police, the Kenya Prisons Service or the Administration Police Force;

(c) the National Youth Service; and

(d) an employer and the employer’s dependants where the dependants are the only employees in a family undertaking.

(3) This Act shall bind the Government.

(4) The Cabinet Secretary may, after consultation with the Board and after taking account of all relevant conventions and other international instruments ratified by Kenya, by order exclude from the application of all or part of this Act limited categories of employees in respect of whom special problems of a substantial nature arise.

(5) The Cabinet Secretary may, after consultation with the Board, by order exclude from the application of all or part of this Act categories of employed persons whose terms and conditions of employment are governed by special arrangements:

Provided those arrangements afford protection that is equivalent to or better than that part of the Act from which those categories are being excluded.

(6) Subject to the provisions of this Act, the terms and conditions of employment set out in this Act shall constitute minimum terms and conditions of employment of an employee and any agreement to relinquish, vary or amend the terms herein set shall be null and void.”

[54] Section 3 of the Employment Act is clear that other than the categories stated therein, the Employment Act applies to all employees employed under a contract of service and provides minimum terms and conditions of employment. Therefore, although the employment of state officers is regulated by the Constitution and relevant statutes, the Employment Act applies to them and they are entitled to rights under the Employment Act, unless the Constitution, or the relevant statute, or their contract of service provide better terms. Given the relationship between the appellants and the respondents, and the matter having been filed in the Employment & Labour Relations Court, we find nothing wrong with the learned Judge being guided by Section 49(1) of the Employment Act in awarding damages.

[55] On the allegation of alteration of the figure on the decree, the record is clear that the original amount awarded by the learned Judge according to the judgment delivered on 27th October, 2016, was the amount of Ksh. 4,072,500/- for each respondent calculated according to the 12 months' salary of each respondent as per their payslip. The record also shows that on 24th November, 2016, an application dated 23rd November, 2016 was filed under certificate of urgency. The application was not certified as urgent but ordered to be mentioned before the learned Judge on 7th December, 2016. When the matter came up for mention Mr. Otieno who was holding brief for the respondents, indicated to the learned Judge that the matter was before the court for direction on two issues, first an application seeking an order for stay of execution pending appeal, and secondly, rectification of the typed judgment. The parties were then given leave to file and exchange replying affidavits and a further affidavit as well as written submissions, and come back to the court on 23rd January, 2017.

[56] Following several adjournments the parties appeared before the court through counsel on 26th July, 2017 with regard to "the judgment not quantified." Counsel for each party having indicated their agreement to the figure 15, 736,562/50 the learned Judge then recorded as follows:

"The figure of Kshs 15,736,562/50 is now computed and added (sic) an addendum to judgment already declined (sic)."

[57] We presume that the learned Judge meant that the figure was to be added as an addendum to the judgment already "delivered" as there is on record a decree issued on 12th July, 2018 which has two additional paragraphs stating as follows:

"6. The petitioners be paid in total Kshs 15,736,562.50 each this being a summation of the damages awarded equivalent to 12 months' salary and the benefits under the contract including gratuity for the period to date and any accrued leave not taken.

7. The decretal sum to be drawn inclusive 6% interest as prayed."

[58] The appellants have argued that the learned Judge erred in altering the judgment and decree from the amount that was awarded of Kshs. 4,072, 500/- to Kshs. 15, 736,562/- after delivery of the judgment when the court was *functus officio*. We find ourselves handicapped in dealing with this limb of the appeal, because the appellants have not included the application and the affidavits which were filed in the lower court in the record of appeal. Secondly, the record of appeal shows that on 26th July, 2017, the parties through their counsel consented to the figure of Kshs.15, 736,562/50. In the original judgment, the learned Judge, had in addition to awarding the sum of Kshs.4,072,500/- to the respondents also awarded "*one month's notice in lieu of notice (sic) and any other benefits under the contract including gratuity for the period to date and any accrued leave not taken*". Therefore, the consent regarding the computation must be interpreted in that light, hence the addition as an addendum and not as an amendment of the decree. The court was merely perfecting its judgment for the purposes of the decree. In this regard, the court was not *functus officio*. For this reason, we dismiss this ground as having no substance.

[59] For the above reasons, we find that the appeal has no merit. It is accordingly dismissed with costs. Those shall be the orders of the Court.

Dated and delivered at Nairobi this 10th day of July, 2020.

W. KARANJA

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original

Signed

DEPUTY REGISTRAR



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